SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

STUDENT LOAN FUND OF IDAHO, INC.,

Petitioner,

v.

JEFFREY DUERNER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Higher Education Act of 1965, as amended, established the Federal Family Education Loan program (previously known as the Guaranteed Student Loan program) which is a multi-billion dollar, nationwide federal program for providing educational funding to college students through the cooperative efforts of private lenders, State and private nonprofit guaranty agencies, and the federal government. The viability of this federal program and the fiscal interests of the federal government and the guaranty agencies are protected, in part, by debt collection activities which are specifically mandated by the Higher Education Act and its respective federal regulations. In direct conflict, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., prohibits many of the same debt collection activities mandated by the Higher Education Act.

The question presented is:

Whether a private nonprofit student loan guaranty agency following debt collection activities mandated by the Higher Education Act is subject to the federal Fair Debt Collection Practices Act which includes restrictions that directly conflict with the Higher Education Act and its implementing regulations?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, the Student Loan Fund of Idaho, Inc., a private nonprofit corporation chartered to promote educational opportunities for Idaho students, and Respondent, Jeffrey W. Duerner.

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PETITION FOR WRIT OF CERTIORARI

Student Loan Fund of Idaho, Inc. ("SLFI") petitions for a writ of certiorari to review judgment of the Supreme Court for the State of Idaho in this case.

OPINIONS BELOW

The opinion of the Supreme Court for the State of Idaho, App., *infra*, at 1a-21a, is reported at 951 P.2d 1272 (Idaho 1997). The opinions and final judgment of the state district court, App., *infra*, at 22a-45a, are unreported.

JURISDICTION

The judgment of the Supreme Court of the State of Idaho was entered on December 30, 1997. App., *infra*, at 1a. SLFI filed a timely petition for rehearing which was denied on February 25, 1998. App., *infra*, at 46a. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) (1998).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, and selected portions of the Higher Education Act, 20 U.S.C. §§ 1001 *et seq.*, are reprinted in the Appendix. App., *infra*, at 47a-68a. Selected Higher

Education Act regulations are reprinted in the Appendix. App., *infra*, at 68a-106a.

INTRODUCTION AND STATEMENT

This case presents federal statutes which cannot be simultaneously applied without forcing student loan guaranty agencies to violate federal law. State and private nonprofit guaranty agencies administer billions of dollars in student loans under the Higher Education Act's (HEA) Federal Family Education Loan Program ("FFELP"). H. Rep. No. 102-447, 102d Cong., 2d Sess. at 8, *reprinted in* 1992 U.S.C.C.A.N. 334, 341. Guaranty agencies like SLFI perform services which make student loans available to the millions of students who must rely on the FFELP and which make the FFELP financially viable for the federal government and for the state and private nonprofit guaranty agencies. In the 1980s and early 1990s, high default rates threatened these important programs. Congress responded with HEA amendments that mandated forceful collection activities by lenders and guarantors and gave them powerful collection tools to carry out the mandate. If applied to guaranty agencies' activities, the Fair Debt Collection Practices Act ("FDCPA") would impose directly conflicting legal obligations on guaranty agencies. It is legally and practically impossible to comply simultaneously with the FDCPA and the HEA with its implementing regulations.

As a private, nonprofit guarantor of student loans participating in the FFELP, SLFI is required to engage in

various "due diligence" activities relating to the collection of defaulted guaranteed student loans. If SLFI fails to comply, the Department of Education ("Department") may impose severe remedial actions against SLFI, ranging from a fine to suspension from further participation in the federal student loan program (which would be a death blow for a guaranty agency). See 34 C.F.R. §§ 682.410(c), 682.413(c)(1) (1996). App., *infra*, at 100a-104a, 104a-106a.

The FDCPA, in turn, squarely prohibits various communications and collection activities – some of which are explicitly mandated for nonprofit guaranty agencies by the HEA and applicable regulations. FDCPA violations may result in substantial civil liability; indeed, mere allegations of FDCPA violations against FDCPA-regulated entities may result in extensive litigation. See 15 U.S.C. § 1692k. App., *infra*, at 62a.

Under the current status of the law, the FDCPA is being applied to guaranty agencies depending upon the geographic location of the student borrower because of the conflicting case law addressing this issue. Two federal district courts and the Iowa Supreme Court have held that the FDCPA does not apply to guaranty agencies. The federal agencies administering the FDCPA and the HEA, the Federal Trade Commission ("FTC") and the Department, uniformly view the FDCPA as being inapplicable to guaranty agencies. Despite this prior case law and the deference owed to the views of these federal agencies, the Idaho Supreme Court and the Ninth Circuit Court of Appeals have created a conflict by ignoring clear congressional intent and holding that the FDCPA does apply to student loan guaranty agencies. The opinions of the

Idaho Supreme Court and the Ninth Circuit Court of Appeals place guaranty agencies seeking to collect on defaulted student loans within the jurisdiction of these courts, such as SLFI in this case, in the circumstance where violation of federal law cannot be avoided.

I. THE STATUTORY AND REGULATORY FRAMEWORK

A. The Higher Education Act and HEA Regulations

The HEA carries out the federal government's support of postsecondary education,[1] a support described by President Johnson as even more important to the national interest than a strong military defense.[2] Title IV of the HEA, 20 U.S.C. §§ 1070 *et seq.*, makes college attendance possible for millions by authorizing federally reinsured student loans.

The volume of federally reinsured loans has grown dramatically since the HEA's inception. "Far from being a loan of convenience for students from middle income families, the Guaranteed Student Loan has become a loan of necessity for all students."[3] Between 1980 and 1990,

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[1] H. Rep. No. 102-447, 102d Cong., 2d. Sess. at 6-7, *reprinted in* 1992 U.S.C.C.A.N. 334, 339-40 (recounting purposes of the Higher Education Act and its amendments).

[2] *Id.* at 340 (recounting President Johnson's message to the Congress in proposing HEA).

[3] *Id.* at 342.

student debt had increased almost threefold to over $50 billion.[4]

The fulcrum of the student loan program – which is now called the Federal Family Education Loan Program ("FFELP") in the HEA Title IV, Part B – is the student loan guarantor. The guarantor issues a guaranty to a lender so that the lender will make an unsecured loan to a student or her parents. The guarantor pays on the guaranty and becomes a "holder" of the note, *see, e.g.*, 20 U.S.C. § 1080a(c)(4), if it goes into a default, in turn claiming reinsurance from the U.S. Department of Education. Guarantors must either be state agencies or, like petitioner SLFI, a private nonprofit organization. 20 U.S.C. § 1085(j). Nonprofit student loan guaranty agencies thus perform the important, socially desirable, and congressionally prescribed function of facilitating the extension of educational opportunities to qualified students in need of financial assistance.

In the 1980s and early 1990s, high rates of student defaults posed huge costs to the federal fisc and threatened the student assistance system. H. Rep. No. 102-447 at 10, *reprinted in* 1992 U.S.C.C.A.N. at 343. Because student financial aid is so important to the national fabric – and to staunch the loss of federal dollars – Congress devoted almost constant attention to the HEA from 1985 through 1994. Congress amended the HEA nine times during that period.[5]

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[4] *Id.*

[5] *See, e.g.*, Consolidated Omnibus Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82; Higher Education Act

Many of those changes took the form of directions to guarantors and their regulator, the Department, to prevent defaults and to collect subsequently defaulted loans.[6] As a consequence, Title IV, Part B of the HEA now comprises almost 200 pages of statutory text. The statutory scheme is comprehensive. It dictates (for example) the terms by which the United States shall reimburse guarantor losses, 20 U.S.C. § 1078(b)(2), and the circumstances by which guarantors will pay lenders, *id.* § 1078(c)(2). The statute broadly authorizes the Department to enforce and interpret the HEA, *id.* § 1082(a), and to fine, suspend, or terminate guarantors who fail to carry out the HEA's provisions, *id.* § 1082(h)(1)(A). These amendments elaborate on the HEA's mandate that guarantors engage in "due diligence" collection efforts – defined, in part, as "collection practices at least as extensive and forceful as those generally practiced by financial institutions for the collection of consumer loans," *id.* § 1085(f) – and authorizes the Department of Education to

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Amendments of 1986, Pub. L. No. 99-498, 101 Stat. 335; Higher Education Technical Act Amendments of 1987, Pub. L. Nos. 100-50, 101 Stat. 361, 362, 100-297, 102 Stat. 1818, 100-369, 102 Stat. 835-38; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; National and Community Service Act of 1990, Pub. L. No. 101-610, 104 Stat. 3150-56; Higher Education Act Technical Amendment of 1991, Pub. L. No. 102-26, 105 Stat. 123; Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, 105 Stat. 1049; Higher Education Act Amendments of 1992, Pub. L. Nos. 102-325, 106 Stat. 448, 103-208, 107 Stat. 2485.

[6] *See generally* Federal Family Education Loan Programs, 57 Fed. Reg. 60,280, 60,281-82 (Dec. 18, 1992) (recounting specific directions to the Department and other FFELP participants).

specify the required "due diligence" activities, *id.* § 1082(a)(1).

The Department has implemented these statutory directives through a detailed regulatory scheme that requires guaranty agencies to conduct detailed pre- and post-default activities. These required activities are designed to minimize the overall student loan default rate by "reduc[ing] defaults and increas[ing] collections on loans that go into default." Guaranteed Student Loan Programs, 55 Fed. Reg. 48,324 (Nov. 20, 1990); *see also* Federal Family Education Loan Programs, 57 Fed. Reg. 60,280, 60,282 (Dec. 18, 1992). The regulations explicitly require guaranty agencies to engage in the mandated "due diligence" activities as a precondition to reimbursement by the Department.[7] These "due diligence" activities serve the twin aims of reducing the ultimate loan default rate and promoting the continuing financial stability of the federal student loan program. *See* 55 Fed. Reg. 40,120 (Oct. 1, 1990). Without these collection activities, the defaulted loans would drain the pool of available loan funds, and ultimately restrict the number of students who are able to obtain post-secondary education.

The regulations prescribe the required pre- and post-default "due diligence" activities in detail. For example, within the first 45 days following payment on a guaranty

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[7] *See* 34 C.F.R. § 682.406(a)(11) ("A guaranty agency is entitled to reinsurance payments on a loan only if . . . [t]he agency exercised due diligence in collection of the loan in accordance with [34 C.F.R.] § 682.410(b)(6) or (7)."), App., *infra*, at 86a.

to a lender, the guaranty agency is required to send the borrower several written notices that must contain specific information about the status of the loan, and must warn the borrower of the consequences of further nonpayment. *See* 34 C.F.R. § 682.410(b)(5), App., *infra*, at 82a. In addition, the regulations require the agency to "[d]iligently attempt" to contact the borrower by phone to demand repayment. *Id.* § 682.410(b)(6)(iii)(B), App., *infra*, at 88a. Over the next 135 days, the agency is again required to attempt to contact the borrower by phone, to send at least three notices "forcefully demanding" repayment from the borrower, and to inform the borrower that their default has been reported to credit bureaus. *See* 34 C.F.R. § 682.410(b)(6)(iv), App., *infra*, at 88a. The agency then must either initiate tax refund offset proceedings or, if it concludes that the borrower is financially incapable of satisfying the repayment obligations, undertake "diligent semi-annual inquiries" to determine if the borrower has acquired sufficient assets to satisfy the debt. *See* 34 C.F.R. § 682.410(b)(6)(viii)(A), App., *infra*, at 91a.[8] The guarantor may also initiate administrative proceedings to garnish the debtor's wages, which necessarily involves contacts with the debtor's employer. *See* 34 C.F.R. § 682.410(b)(10), App., *infra*, at 96a-100a.

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[8] The regulations also require the agency, in certain circumstances, to utilize "all available skip-tracing techniques" to locate a borrower, including seeking information from the IRS, credit bureaus, state motor vehicle departments, and the student's school. *See* 34 C.F.R. § 682.410(b)(6)(xii), App., *infra*, at 93a.

The nonprofit student loan guaranty agency thus is required to send the borrower various notices with particular information, contact the borrower by phone, advise the borrower of the potential legal action that may be taken in the event of further noncompliance, and ultimately, initiate legal or administrative proceedings as are necessary to recover the loan proceeds. *See* 34 C.F.R. §§ 682.410(b)(5)(vi); (b)(6)(iii)(A), App., *infra*, at 84a-86a, 88a. If the nonprofit student loan guaranty agency fails to comply with these "due diligence" requirements, the Secretary of Education may take remedial action against the agency, including fines and suspension from the FFELP. *See* 34 C.F.R. § 682.413, App., *infra*, at 104a-106a.

B. The Fair Debt Collection Practices Act

The FDCPA, in contrast, responds to a fundamentally different problem: that of "third persons who regularly collect debts for others." S. Rep. No. 382 at 3, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e), App., *infra*, at 54a.

The statute defines a "debt collector," in part, as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts

owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6), App., *infra*, at 48a. The statute then enumerates six specific categories that are excluded from the term: (1) the creditor exemption, 15 U.S.C. §§ 1692a(6)(A) & 1692a(4), App., *infra*, at 49a, 48a; (2) the common ownership exemption, 15 U.S.C. § 1692a(6)(B), App., *infra*, at 49a; (3) the government actor exemption, 15 U.S.C. § 1692a(6)(C), App., *infra*, at 49a; (4) the legal process exemption, 15 U.S.C. § 1692a(6)(D), App., *infra*, at 50a; (5) the consumer counseling exemption, 15 U.S.C. § 1692a(6)(E), App., *infra*, at 50a; and (6) a miscellaneous debt exemption (*i.e.*, debts incidental to a fiduciary or escrow arrangement; debts originated by the collector; debts not in default at the time obtained by the collector; and debts obtained as a secured party in a commercial credit transaction), 15 U.S.C. § 1692a(6)(F), App., *infra*, at 50a.

The FDCPA specifies various obligations for those entities subject to its provisions. The statute sets forth in detail permissible communications with the debtor, specifying, *inter alia*, limits on contact with a debtor at home and at work, 15 U.S.C. §§ 1692c(a)(1), (3), App., *infra*, at 52a; limits on the ability to provide any written or oral information to the debtor directly if the debtor is represented by counsel, 15 U.S.C. § 1692c(a)(2), App., *infra*, at 52a; limits on communications with third parties in connection with the collection of a debt, 15 U.S.C. § 1692c(b), App., *infra*, at 52a-53a; and requirements that debt collectors cease communication with a debtor upon request, subject to a few defined exceptions, 15 U.S.C. § 1692c(c), App., *infra*, at 53a. The statute also specifies in detail the

content of any notice sent to the debtor, 15 U.S.C. § 1692g, App., *infra*, at 59a.

The FDCPA provides substantial civil liability for any violations. An entity subject to the FDCPA is subject to private lawsuits for (1) actual damages; (2) an additional fine (up to $1,000 for an individual and up to the lesser of $500,000 or 1% of the net worth of the entity in a class action); and (3) attorney's fees, 15 U.S.C. § 1692k(a), App., *infra*, at 62a. Actions may be brought, without regard to the amount in controversy, in any federal district court or other court of competent jurisdiction, 15 U.S.C. § 1692k(d), App., *infra*, at 63a. The statute also provides that the Federal Trade Commission shall enforce its provisions, 15 U.S.C. § 1692l, App., *infra*, at 64a.

II. THE LITIGATION

A. Respondent's Guaranteed Student Loans and Default

Between September 1979 and April 1982, respondent Duerner obtained four SLFI guaranteed student loans with an aggregate total of $4,000.00 for the purpose of attending college at Northwest Nazarene College. The loan application forms were created by SLFI and approved by the Department. Each application bore petitioner SLFI's name.

Six months after his graduating from college, respondent became obligated to repay the loans in monthly installments. After making a few limited payments on two of the loans, respondent failed to make payments with delinquency continuing for more than 180 days.

Default claims were then filed with petitioner pursuant to its guarantee agreements with the lending institutions. Petitioner paid the default claims on respondent's delinquent loans thus becoming the sole owner and acquiring all rights under the promissory notes.

In accordance with its agreements with the Department, SLFI undertook various collection efforts regarding the defaulted loans. These efforts included sending collection notices directly to the borrower, as required by Department regulations,[9] and contacting the borrower directly, as also required by the Department regulations.[10]

B. The Idaho District Court Litigation

In 1987, petitioner instituted this suit against respondent to recover on the defaulted notes. Respondent counterclaimed by alleging, among other things, that SLFI had violated the FDCPA.[11] Upon cross motions for summary judgment, the district court ruled that SLFI was subject to the FDCPA. App., *infra*, at 25a-30a. At the subsequent jury trial, SLFI was found to have violated the FDCPA and damages were awarded to respondent.

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[9] *See* 34 C.F.R. § 682.410(b)(5)(ii)(A), App., *infra*, at 83a; *id.* § 682.410(b)(5)(vi), App., *infra*, at 84a-86a; *id.* § 682.410(b)(6)(iii)(A), App., *infra*, at 88a; *id.* § 682.410(b)(6)(iv)(B), App., *infra*, at 89a.

[10] *See* 34 C.F.R. § 682.410(b)(6)(iii)(B), App., *infra*, at 88a; *id.* § 682.410(b)(6)(iv)(A), App., *infra*, at 88a-89a;

[11] SLFI seeks review of only those portions of the lower courts' rulings related to the applicability of the FDCPA to SLFI's collection activities. App., *infra*, at 25a-30a, 6a-8a.

The district court held as a matter of law, the FDCPA is applicable to petitioner. The district court's ruling was based on its conclusion that petitioner is a "debt collector" as defined by the FDCPA whose principal business is debt collecting. App., *infra*, at 26a. The district court's reasoning for this conclusion is 1) since petitioner derives a significant revenue from its collection activities its principal business must be debt collection, App., *infra*, at 26a; and 2) since SLFI did not originate the loans, it must be collecting on debts owed or due to another. App., *infra*, at 30a. However, both reasons given by the district court in support of its conclusion are contrary to the clear meaning of the HEA and the FDCPA.

C. The Idaho Supreme Court's Decision

Petitioner appealed, challenging the district court's conclusion that the FDCPA applied to SLFI. Several arguments relating to the applicability of the FDCPA which were raised with the district court but not addressed by that court, were also raised on appeal. SLFI argued that the district court erred because 1) SLFI's primary business purpose is not the collection of debts; 2) SLFI's collects solely on debts due and owing to SLFI; 3) even if SLFI is a "debt collector," SLFI is exempted from coverage under the FDCPA due to the "government actor" exemption; 4) the district court failed to give any deference to or even consider official positions of the federal agencies administering the HEA and the FDCPA; and 5) the district court failed to reconcile or even consider the conflicts between the HEA and the FDCPA.

The Idaho Supreme Court upheld the district court's ruling on the grounds that SLFI did not originate the debt and did not obtain the debt until after default therefore SLFI is a "debt collector" for purposes of the FDCPA. App., *infra*, at 7a. The Idaho Supreme Court further found that the exception for government actors does not apply because "SLFI did not become a government employee by virtue of its contract with a government agency, the Department of Education." App., *infra*, at 8a. No case law or legislative history is cited by the Idaho Supreme Court in support of its position relating to the FDCPA. The Idaho Supreme Court did not address other issues raised on appeal concerning the applicability of the FDCPA in that the court found the definition of a "debt collector" to be dispositive. App., *infra*, at 7a.

SLFI petitioned the Idaho Supreme Court to reconsider its ruling in order to address, among other things, the conflict between the HEA and the FDCPA created by its ruling, the conflict between its ruling and the positions of federal agencies, the conflicting case law, and its erroneous interpretations and application of federal statutes. SLFI's Petition for Rehearing was denied without briefing or oral arguments on February 25, 1998. App., *infra*, at 46a.

REASONS FOR GRANTING THE PETITION

The issue presented – the applicability of the FDCPA to nonprofit student loan guaranty agencies for their conduct in carrying out the mandates of the HEA program – is of fundamental and recurring importance to the

operation and administration of the massive federal student loan program. The Idaho courts, moreover, decided the issue erroneously, and in a manner that conflicts with the administrative interpretations of the two federal agencies responsible for interpreting the pertinent statutes, and most courts that have previously considered the matter. Review by this Court is therefore warranted, and essential to address inconsistent statutory and regulatory obligations created by the Idaho courts' decisions.

I. THE ISSUES ARE OF FUNDAMENTAL AND RECURRING IMPORTANCE

The applicability of the FDCPA to nonprofit student loan guaranty agencies raises a question that goes to the heart of the principal federal student loan program. By statutory and regulatory design, nonprofit student loan guaranty agencies play the major role in the operation of this program. The question presented here is whether nonprofit student loan guaranty agencies should, as has been previously believed, follow the commands of the HEA, the HEA regulations, and the Department's contracts and undertake specified collection actions; or whether those actions are prohibited by the FDCPA. The sanction for non-compliance with the FDCPA is substantial civil liability; the sanction for non-compliance with the HEA statutory, regulatory, and contract obligations ranges from fines to debarment altogether from the federal student loan program.

The FDCPA and the HEA impose inconsistent legal obligations. The HEA programs require direct communications with borrowers that the FDCPA prohibits. App.,

infra, at 88a-90a. In addition, the HEA regulations mandate that a guaranty agency make "diligent" attempts to trace a borrower whose location is unknown, 34 C.F.R. § 682.410(b)(6)(xii), App., *infra*, at 93a, while the FDCPA prohibits more than one contact with a third party for this purpose, unless the initial information received was incorrect and correct information is now available, 15 U.S.C. § 1692b(3), App., *infra*, at 51a. The HEA regulations require communications with the borrower at specified intervals, 34 C.F.R. § 682.410(b)(6)(iii)-(ix), App., *infra*, at 88a-92a, while the FDCPA requires that a collector terminate communications at the borrower's request, 15 U.S.C. § 1692c(c), App., *infra*, at 53a. The HEA regulations require that an agency inform a borrower soon after default that it will pursue a civil suit if repayment is not forthcoming, 34 C.F.R. §§ 682.410(b)(5)(ii)(A), (b)(5)(vi)(L), App., *infra*, at 83a, 86a, but subsequently permits the agency to decline to file suit if it is unlikely to lead to repayment, *id.* § 682.410(6)(vii)(B), App., *infra*, at 90a. Under the FDCPA, however, a collector is liable for "false misrepresentations" if it indicates it will file suit, but does not actually intend to do so. 15 U.S.C. § 1692e(4), (5), App., *infra*, at 55a. In all of these instances, a nonprofit student loan guaranty agency will face litigation alleging violations of one set of federal legal obligations by complying with another.

Furthermore, nonprofit student loan guaranty agencies are empowered to use the administrative wage garnishment provisions of 20 U.S.C. § 1095a. Use of the wage garnishment provisions, however, requires notice to the borrower's employer that there is a debt giving rise to the wage garnishment. Yet the FDCPA expressly prohibits

any FDCPA-regulated entity from mentioning that a borrower owes a debt in any contact with a third person – including an employer, 15 U.S.C. § 1692c(b), App., *infra*, at 52a-53a. This too reflects the conflicting mandates of the FDCPA and the HEA.

The importance of the issue presented is especially pronounced because it directly affects the handling of a high volume of loans on a daily basis. Billions of dollars in loans nationwide are handled by guaranty agencies. *See* pp. 4-5, *supra*.

In addition to the difficulties created by the inconsistent legal obligations of the FDCPA and the HEA, imposition of FDCPA liability is of fundamental and recurring importance because it will have significant adverse effects on the FFELP. To the extent that nonprofit student loan guaranty agencies adhere to the FDCPA rather than the HEA requirements, the result will significantly compromise Congress's interest in the forceful collection of federally-reinsured student loans. As the Department has emphasized, "application of the FDCPA to the guaranty agencies . . . is inconsistent with the Secretary's goal of ensuring a minimum standard of collection action." 61 Fed. Reg. at 60,485, App., *infra*, at 118a. The adverse impact thus will have a direct effect on the federal fiscal interest. It also may well have a significant effect on the availability of student loans for those who wish to pursue a college education because a higher rate of defaults will deplete available federal funds (which are used to partially compensate guaranty agencies for default payments).

The issue presented is of particular importance, moreover, because the Idaho courts' decisions have produced sharply conflicting authority about requirements applicable to guarantors. Almost all courts that previously had addressed the issue had held that the FDCPA does not apply to nonprofit student loan guaranty agencies.[12] [13]

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[12] *See Fischer v. Unipac Service Corp.*, 519 N.W.2d 893, 800 (Iowa 1994) ("[W]e believe that collection efforts by holders of federally insured student loans or their servicing companies are simply not the kind of activity Congress intended to regulate."); *Games v. Cavazos*, 737 F. Supp. 1368, 1388 (D. Del. 1990) ("[T] he sending of these notices by USA Funds and other private guarantee agencies in connection with their administration of the GSL Program is simply not the kind of activity Congress intended to regulate."); *Edler v. Student Loan Marketing Ass'n*, No. 92-1619, 1993 WL 652270 at *2 (D.D.C. Dec. 13, 1993) ("The FDCPA is . . . inapplicable to [the guaranty agency] as a matter of law."); *Leerssen v. United Student Aid Funds, Inc.*, No. 94CV4868 (Colo. Dist. Ct. Sept. 21, 1995). The Ninth Circuit Court of Appeals is the only court, other than the Idaho courts in the present case, that has held to the contrary. *See Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996), *reh. den., cert. den.*, 117 S. Ct. 2484, 2496 (1997).

[13] The conflict between the Idaho courts' decision and the Iowa Supreme Court's *Fischer* decision is itself a sufficient basis for this Court's review. *See* S. Ct. Rule 10(b) (1997) (an important consideration for certiorari arises when a "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). The conflict decisions in the Ninth Circuit Court of Appeals' decision in *Brannan* and the Iowa Supreme Court's *Fischer* also indicate that there is sufficient basis for this Court to review this important federal question. *See* S. Ct. Rule 10(a) (1997) (an important consideration for certiorari arises when a "United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

The two federal agencies with jurisdiction for administering the FDCPA and the HEA likewise have concluded, in conflict with the Idaho courts, that the FDCPA does not apply to nonprofit student loan guaranty agencies participating in the FFELP. App., *infra*, at 107a-117a. This conflict results in a guaranty agency being subject to FDCPA based on the location of the student borrower at the time of default. If the student borrower ends up in the State of Idaho or within the jurisdiction of the Ninth Circuit based on its ruling in *Brannan*, then the student loan guaranty agency must choose between violating the FDCPA or the HEA in seeking to collect on the defaulted loans. It cannot comply with both.

Student financial assistance, indeed, is a nationwide program that demands uniform standards. This is especially true because at the time the loan is guaranteed, guarantors cannot predict where their HEA-mandated conduct in the event of default will be adjudicated. For example, this case involves a guarantor from Idaho and a former student residing in Idaho. While the student borrower in this case went to school and resides in Idaho, it is equally possible in any given loan situation that a student borrower will move away from school and then go into default in a different State. It is impossible when originating or guaranteeing a loan for a guarantor to foresee that a student will leave school and then reside in a contradictory jurisdiction of the State of Idaho. Yet it is the fortuity of the former student's location that will determine the law applicable to the "due diligence" activities to which the courts will be forced to ascribe FDCPA significance.

Furthermore, in light of the immediate, direct impact on the daily administration of millions of individual loans, this issue cannot be permitted to "percolate" as other courts consider the matter. The adverse effects – and the intolerable situation created for nonprofit student loan guaranty agencies, who face inconsistent legal obligations – are occurring on a daily and widespread basis, and will continue to do so, absent resolution by this Court. Uncertainty about applicable legal requirements in this far-reaching federal program serves no valid purpose, and operates only to harm guarantors, borrowers, and the federal government. Review by this Court is necessary to address the problems and uncertainty created by the Idaho courts' decisions.

II. THE IDAHO COURTS' INTERPRETATION IS ERRONEOUS

Contrary to the Idaho courts' holding, the FDCPA should not be interpreted to apply to nonprofit student loan guaranty agencies.

At the outset, FDCPA applicability would conflict with congressional purpose and intent. The actions of nonprofit student loan guaranty agencies in the FFELP are far from the problem that Congress sought to address in enacting the FDCPA. Congress, in the HEA, has commanded guaranty agencies to exercise a broad panoply of creditor rights, all of which are consistent with the guarantor's pre-claim involvement and eventual ownership of the note. By contrast, the FDCPA was adopted to protect consumers against abusive practices by third party debt collectors. S. Rep. No. 382, at 2, *reprinted in* 1977 U.S.C.C.A.N. at 1696 ("The committee has found that

debt collection abuse by *third party debt collectors* is a widespread and serious national problem." (emphasis added)). Nonprofit student loan guaranty agencies, moreover, undertake their activities at the direction of the federal program. Unlike independent collectors, who collect debts for a third party, nonprofit student loan guaranty agencies carry out their due diligence obligations at a time when they are the holder of the note and thus do not pose the same threat to consumers that Congress identified from independent collectors. Unlike independent collectors, nonprofit student loan guaranty agencies are involved with borrowers from the time a note is executed, rather than initiating communication only upon default. Unlike independent collectors, nonprofit student loan guaranty agencies are governed by explicit restrictions established by the federal government, which spell out in detail the disposition of any collected funds. *See* 20 U.S.C. § 1078(c)(2)(D); 34 C.F.R. § 682.410(a), App., *infra*, at 72a-75a.

Guaranty agencies such as petitioner thus are not characterized by the incentives which, Congress found, encourage third party collectors to engage in abusive practices.[14] Indeed, the HEA explicitly requires that guarantors engage in collection practices "at least as extensive and forceful *as those generally practiced by financial institutions for the collection of consumer loans,*" 20 U.S.C. § 1085(f) (emphasis added) – and "financial institutions" engaged

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[14] *See generally Games*, 737 F. Supp. at 1389; *Fischer*, 519 N.W.2d at 799 (compliance with the HEA due diligence requirements is not the type of activity Congress intended to regulate in enacting the FDCPA).

in "the collection of consumer loans" would not be subject to the FDCPA's prohibitions. Viewing the statute as a whole, in light of the congressional purpose, it is clear that the FDCPA should not be interpreted to apply to nonprofit student loan agencies discharging their responsibilities in the FFELP.

In recognition of the HEA's comprehensive regulatory scheme, courts repeatedly have held that the HEA does not afford a private right of action. *See generally Bartels v. Alabama Commercial College, Inc.*, 918 F. Supp. 1565, 1574-75 (S.D. Ga. 1994) (collecting cases) ("[A]n overwhelming majority of the Courts who have considered this issue have also found that there is no private cause of action under the HEA."). This is so in part because a private right of action would "interfere with the broad enforcement powers of the Secretary." *Id.* at 1574. Yet allowing a private right of action under the FDCPA would go far beyond "interfer[ing]" with the HEA's administrative scheme, and create directly conflicting legal obligations for guarantors.

Furthermore, the non-applicability of the FDCPA is made clear by the government actor exemption. By its explicit terms, the statute exempts from FDCPA coverage government actors – *i.e.*, "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C), App., *infra*, at 49a. Although not government agencies, nonprofit student loan guaranty agencies undertake their activities at the explicit command of the federal government, in detailed instructions set forth in federal contracts, regulations, and statute. This express federal direction is true

both generally, and specifically as it relates to the communication activities at issue under the FDCPA. Nonprofit student loan guaranty agencies perform the same function as state guaranty agencies, moreover, and under the HEA, only nonprofit student loan guaranty agencies and state agencies may perform the vital loan guarantee function. *See* 20 U.S.C. § 1078(b)(1); *Games*, 737 F. Supp. at 1382 ("The loan is insured by a State or private guarantee agency such as USA Funds."). Applying the government actor exemption to State student loan guaranty agencies but not to private nonprofit student loan guaranty agencies makes an illogical distinction that is not supported by statute nor by congressional intent.

The *Games* court, moreover, squarely addressed this question, and found that the petitioner in that case, a private nonprofit student loan guaranty agency, was properly characterized a government actor for purposes of the FDCPA exemption when participating in the federal tax offset program for recovery of defaulted student loans. The court explained that petitioner implemented a federal program involving federal dollars and exercised minimal discretion in conducting the challenged collection actions. 737 F. Supp. at 1382-83, 1387-88. Petitioner operated under like constraints when it contacted respondent to encourage repayment, and should be treated as a government actor.[15] The Idaho courts' summary

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[15] Indeed, the question in this case concerns the appropriate characterization of an entity closely directed and supervised by the government – an issue that, in various respects, this Court has addressed with frequency. *See, e.g. Richardson v. McKnight, cert. granted*, No. 96-318, 117 S. Ct. 504 (1996) (whether employees of state-hired private corrections

discussion of the government actor issue fails to address these points, or even to acknowledge the comprehensive, conflicting discussion in *Games*.

The FDCPA's definition of a "creditor" – which is not subject to FDCPA applicability – likewise establishes the non-applicability of the FDCPA to nonprofit student loan guaranty agencies. The FDCPA exempts "creditors" – *i.e.*, "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. §§ 1692a(4) & 1692a(6)(A), App., *infra*, at 48a, 49a. When a nonprofit student loan guaranty agency takes assignment of a guaranteed student loan following default by a borrower, as in this case, it becomes an entity "to whom a debt is owned." Moreover, nonprofit student loan guaranty agencies do not receive the assigned loan "solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4), App., *infra*, at 48a. While a nonprofit student loan agency remits *a portion* of any debts it successfully collects to the Department of Education for reimbursement of losses on

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company are entitled to qualified immunity); *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996) (whether government contractors are entitled to the same First Amendment protections that are applicable to government employees); *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996) (same); *Hercules, Inc. v. United States*, 116 S. Ct. 981 (1996) (whether federal contractors who acted at government instruction in producing Agent Orange are entitled to compensation from government for settlement).

default claims, it retains a certain percentage of the collection proceeds to carry out its obligations under the HEA. *See* 20 U.S.C. § 1078(c)(2)(C). In performing its statutory obligations, a nonprofit student loan guaranty agency does not collect, or receive the assignment, "solely for the purpose of facilitating collection of such debt for another." It becomes the holder of the note and retains the proceeds to administer the FFELP. Thus, a nonprofit student loan guaranty agency is a "creditor" under the FDCPA; accordingly, the FDCPA does not apply.

The error of the Idaho courts' holding is highlighted by the persuasive, abundant authority to the contrary. As discussed, almost every court that had addressed the issue, including the Iowa Supreme Court, has concluded previously that the FDCPA does not apply to nonprofit student loan guaranty agencies in the FFELP.[16] The federal agencies responsible for administering the FDCPA and the HEA likewise have held explicitly that the FDCPA is inapplicable to the activities at issue.[17] App., *infra*, at 107a-118a. The Idaho courts, in contrast, would allow private litigants to prosecute claims for actual and

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[16] Although these courts emphasized different FDCPA provisions (such as the *Games* court's emphasis on the government actor exemption), they uniformly concluded that the FDCPA was not intended to apply to nonprofit student loan guaranty agencies in the federal student loan program. *See* note 12, *supra*.

[17] Indeed, although petitioner believes that the nonapplicability of the FDCPA is clear from the statute, to the extent that there is any ambiguity, the federal agencies should receive deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

punitive damages against nonprofit student loan guaranty agencies bound to take "due diligence" and other collection steps in direct conflict with the prohibitions of the FDCPA. Thus steps taken by nonprofit student loan guaranty agencies to protect the federal fiscal interest and promote "forceful" collection under the HEA, 20 U.S.C. § 1085(f), will result directly in claims for damages by private attorneys general supposedly vindicating the purposes of the FDCPA.

In actuality and by the plain terms of both the HEA and the FDCPA, Congress did not intend these bizarre results. The prohibitions of the FDCPA do not apply to nonprofit student loan guaranty agencies because that Act does not regulate such agencies; instead, nonprofit student loan guaranty agencies are regulated comprehensively and minutely by the HEA and its administrative framework.

The Idaho courts' holding that the FDCPA applies to nonprofit student loan guaranty agencies in the federal student loan program represents a radical deviation from the settled understanding that had governed interpretation and implementation of both statutes, and should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 23262

STUDENT LOAN FUND OF IDAHO, INC., Plaintiff-Counterdefendant-Appellant, v. JEFFREY W. DUERNER, Defendant-Counterclaimant-Respondent.	1997 Opinion No. 135 Boise, September 1997 Term Filed: December 30, 1997 Frederick C. Lyon, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Appeal from a jury verdict and judgment in favor of respondent Jeffrey W. Duerner in a debt collection suit. *Affirmed.*

Marcus, Merrick & Montgomery, Meridian, for appellant. Wilbur T. Nelson argued.

Uranga, Uranga & Beiter, Boise, for respondent. Jean Uranga argued.

TROUT, Chief Justice.

This is an appeal from a jury verdict and judgment in favor of respondent Jeffrey W. Duerner in a debt collection suit. We affirm.

I.

BACKGROUND

Jeffrey W. Duerner (hereinafter "Duerner") obtained $4,000 in student loans between 1979 and 1982. The first two loans were from Idaho First National Bank, for a total of $1,500. The second two loans were from First Security Bank, for a total of $2,500. All four loans were guaranteed by the Student Loan Fund of Idaho, Inc. (hereinafter "S.L.F.I."). The Department of Education contracted with S.L.F.I., pursuant to the Higher Education Act, to guarantee loans made by lenders to qualified students. *See* 20 U.S.C. § 1072(a). The Department of Education agreed to reimburse S.L.F.I. for certain losses it suffered in acting as guarantor. *See* 20 U.S.C. § 1078(c)(1)(B).

In 1983, Duerner defaulted on the First Security loans. S.L.F.I. paid First Security the amount due under its guarantee and First Security transferred the loans to S.L.F.I. S.L.F.I. instituted collection proceedings against Duerner. Duerner claims that he paid S.L.F.I. $2,500 in 1984 to pay off these two loans. However, S.L.F.I. has no record of this payment and Duerner cannot produce the receipt of the money order used to pay the loans. Duerner defaulted on the Idaho First National loans in 1984. S.L.F.I. paid Idaho First National the amount due under its guarantee and Idaho First National transferred the loans to S.L.F.I.

In 1987, S.L.F.I. instituted suit against Duerner to collect the amount due under all four loans. Duerner contacted S.L.F.I. and requested the "payoff amount." Duerner sent a check to S.L.F.I. for $1,769.84, the amount S.L.F.I. stated was the "payoff amount." Duerner claimed

that he believed this amount would pay off all of the loans because he had already sent the $2,500 check for the First Security loans. Duerner did not file an answer or appear in the litigation because he thought his payment resolved the issue. S.L.F.I. obtained a default judgment against Duerner for $6,572.53, an amount that did not take into account his payments thus far.

In 1990, Duerner contacted S.L.F.I. and was told that the entire debt could be paid off for $70.00. Duerner paid the $70.00 and received a letter from S.L.F.I. informing him that his obligation was paid in full. The letter contained the four promissory notes, stamped "paid in full." Later, S.L.F.I. claimed that Duerner never paid the $2,500 on the First Security loans. Rather, S.L.F.I. stated a computer error caused the promissory notes to be stamped "paid in full."

II.

PROCEDURAL HISTORY

The 1987 default judgment obtained by S.L.F.I. was set aside by the district court on March 1, 1993. S.L.F.I. filed an amended complaint and obtained a second default judgment on April 8, 1993. Duerner filed an answer on April 13, 1993. Duerner later amended his answer to include a counterclaim alleging violations of the Fair Debt Collection Practices Act, violations of the Fair Credit Reporting Act, and defamation. The second default judgment was set aside by the district court on May 25, 1993. On January 29, 1996, S.L.F.I. filed a motion for judgment on the pleadings or for summary judgment

as to Duerner's counterclaims. The district court denied both motions.

On May 24, 1996, after a trial to a jury, the jury returned a verdict denying recovery to S.L.F.I. on the student loan debt; denying recovery to Duerner on his claim under the Fair Credit Reporting Act; awarding actual damages of $2,118 to Duerner on his claim under the Fair Debt Collection Practices Act; awarding Duerner compensatory damages of $19,375 on his defamation claim; and awarding Duerner punitive damages of $101,250 on his defamation claim. On June 12, 1996, S.L.F.I. filed a motion for judgment notwithstanding the verdict and for new trial. The court denied S.L.F.I.'s motions. S.L.F.I. filed a notice of appeal and sought to stay execution of the judgment pending appeal. Pursuant to I.A.R. 13(b)(15), the district court required S.L.F.I. to post a bond which was calculated based on the amount of the entire judgment, including costs and attorney's fees.

On appeal, S.L.F.I. argues that the district court erred in: (1) denying S.L.F.I.'s motion for judgment on the pleadings or for summary judgment; (2) denying S.L.F.I.'s motion for directed verdict; (3) submitting the issue of punitive damages to the jury; (4) giving Jury Instruction No. 7, which instructed the jury on the effect of a creditor erroneously returning a promissory note to a debtor; (5) denying S.L.F.I.'s motion for judgment notwithstanding the verdict; (6) denying S.L.F.I.'s motion for new trial; and (7) calculating the required bond for staying execution of the judgment pending appeal. Also, both S.L.F.I. and Duerner seek attorney's fees on appeal.

III.

THE DISTRICT COURT DID NOT ERR IN DENYING S.L.F.I.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE APPLICABILITY OF THE FAIR DEBT COLLECTION PRACTICES ACT AND THE FAIR CREDIT REPORTING ACT TO S.L.F.I.

A. Standard of Review

We review a trial court's ruling on a motion for judgment on the pleadings de novo. *Trimble v. Engelking*, 939 P.2d 1379, 1381 (Idaho 1997) (citing *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995)); *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1460 (1997) (citations omitted). A judgment on the pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Sterling v. Bloom*, 111 Idaho 211, 212, 723 P.2d 755, 756 (1986); *McGann*, 102 F.3d at 392 (citation omitted).

When reviewing a trial court's ruling on a summary judgment motion, we employ the same standard properly employed by the district court when originally ruling on the motion. *Lamb v. Manweiler*, 129 Idaho 269, 271-72, 923 P.2d 976, 978-79 (1996) (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 271, 923 P.2d at 978 (citing I.R.C.P. 56(c); *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995)). Also, the record must be liberally construed in favor of the party opposing the motion for summary judgment, drawing all reasonable

inferences and conclusions supported by the record in favor of that party. *Id.* at 272, 923 P.2d at 979 (citing *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 200, 899 P.2d 411, 413 (1995)).

B. Fair Debt Collection Practices Act

S.L.F.I. claims the district court erred in ruling that the Fair Debt Collections Practices Act (hereinafter "F.D.C.P.A.") applies to S.L.F.I. S.L.F.I. asserts it is not subject to the F.D.C.P.A. because it is not a "debt collector" within the meaning of the F.D.C.P.A. A "debt collector" is defined as

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . .
>
> . . . .
>
> The term does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F).

We examine only that portion of 15 U.S.C. § 1692a(6) which defines a "debt collector" as one who regularly collects debts owed to another, as it is dispositive of this issue. This section excludes from the definition of "debt collector" entities seeking to collect a debt which they originated. *See* 15 U.S.C. § 1692a(6)(F)(ii). Also, this section excludes entities seeking to collect debts which were not in default when they were obtained by such entities. *See* 15 U.S.C. § 1692a(6)(F)(iii). Thus, by definition, "debt collector" must include entities seeking to collect a debt which originated with another entity, and which was obtained by the entity now seeking to collect on the debt after the debt was in default.

In this case, the record supports the district court's finding that S.L.F.I. regularly collects debts owed to another. First, S.L.F.I. did not originate Duerner's loans. Rather, the loans were originated by Idaho First National Bank and First Security Bank. Second, S.L.F.I. did not obtain possession of Duerner's loans until after Duerner had defaulted on those loans. Third, an S.L.F.I. employee testified that S.L.F.I. regularly obtains defaulted loans from other entities and attempts to collect these loans. Therefore, S.L.F.I. is a "debt collector" for the purpose of the F.D.C.P.A. because S.L.F.I. regularly collects debts owed to another.

S.L.F.I. argues that even if it regularly collects debts owed to another, it is excepted from the definition of a "debt collector" under 15 U.S.C. § 1692a(6)(C). The F.D.C.P.A. excepts from the definition of a debt collector "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15

U.S.C. § 1692a(6)(C). S.L.F.I. did not become a government employee by virtue of its contract with a governmental agency, the Department of Education. We find that the exception for government employees does not apply to S.L.F.I.

We hold that the district court did not err in denying S.L.F.I.'s motion for judgment on the pleadings because the pleadings stated a cause of action. Also, the district court did not err in denying S.L.F.I.'s motion for summary judgment because disputed issues of fact remained regarding S.L.F.I.'s debt collection practices.

C. Fair Credit Reporting Act

S.L.F.I. claims the district court erred in ruling that the Fair Credit Reporting Act (hereinafter "F.C.R.A.") applies to S.L.F.I. We will not consider this issue on appeal, nor any of the other issues asserted by S.L.F.I. related to the F.C.R.A., because the jury did not find any violations of the F.C.R.A. or award any damages under the F.C.R.A. Therefore, error, if any, by the district court is harmless. *See generally McLean v. City of Spirit Lake*, 91 Idaho 779, 785, 430 P.2d 670, 676 (1967).

IV.

THE DISTRICT COURT DID NOT ERR IN DENYING S.L.F.I.'S MOTION FOR DIRECTED VERDICT.

A. Standard of Review

"A directed verdict is proper only where the evidence is so clear that all reasonable minds could reach

only one conclusion: that the moving party should prevail." *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994). In ruling on a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party. *Id.* If the non-moving party produces sufficient evidence from which reasonable minds could find in its favor, then the motion for directed verdict should be denied. *Id.* (citation omitted).

On appeal, the standard of review is the same as the standard used by the trial court in passing upon the original motion. *Id.* Further, when reviewing this after the case has been submitted to the jury, we review the full record, rather than the evidence presented only during the plaintiff's case. *Beco Constr. Co., Inc. v. Harper Contracting, Inc.*, 130 Idaho 4, 8, 936 P.2d 202, 206 (Ct. App. 1997).

B. Fair Debt Collection Practices Act

S.L.F.I. contends the district court erred in submitting Duerner's counterclaim for violations of the F.D.C.P.A. to the jury. However, at trial, Duerner presented sufficient evidence of numerous violations of the F.D.C.P.A. to justify submitting the F.D.C.P.A. claim to the jury, and to support the jury's ultimate verdict.

First, Duerner presented sufficient evidence that S.L.F.I. made false representations with respect to the debt owed by Duerner. *See* 15 U.S.C. § 1692e. On numerous occasions, S.L.F.I. reported to credit reporting agencies inaccurate amounts owed by Duerner. Also, S.L.F.I. reported Duerner's account as a collection account

after it had told Duerner that his account was paid in full. Second, Duerner presented sufficient evidence that S.L.F.I. communicated with Duerner when he was represented by counsel. *See* 15 U.S.C. § 1692b(6); 15 U.S.C. § 1692c(a)(2). S.L.F.I. was aware that Duerner was represented by counsel, yet it sent notices to Duerner stating that his tax refund would be offset against the debt owed to S.L.F.I.

Third, Duerner presented sufficient evidence that S.L.F.I. failed to validate Duerner's debt when requested by Duerner to do so. *See* 15 U.S.C. § 1692g. S.L.F.I. failed to validate Duerner's debt when he filed two credit disputes in 1988 and 1990, and when he presented proof to S.L.F.I. that his account had not been credited for payments he had made.

Fourth, Duerner presented sufficient evidence that S.L.F.I. filed suit against Duerner in an improper venue. *See* 15 U.S.C. § 1692i. S.L.F.I. sued Duerner in Payette County even though Duerner resided in Ada County. Also, Duerner presented evidence that S.L.F.I. sues every student debtor in Payette County, regardless of where they reside.

Fifth, Duerner presented sufficient evidence that S.L.F.I. engaged in unconscionable conduct in the collection of Duerner's debt. *See* 15 U.S.C. § 1692f. S.L.F.I. told Duerner that he was taken off the tax offset program, when in fact he was still subject to the program; as a result, Duerner filed his tax return and lost his tax refund. Also, S.L.F.I. reported to credit reporting agencies that notes paid by Duerner were unpaid.

We hold that the district court did not err in denying S.L.F.I.'s motion for directed verdict with respect to Duerner's counterclaim for violations of the F.D.C.P.A.

C. Defamation

S.L.F.I. contends the district court erred in submitting Duerner's counterclaim for defamation to the jury. In Jury Instruction No. 20, the district court stated that Duerner would have to prove the following in order to succeed on the defamation claim:

1. That the plaintiff published or communicated to credit reporting agencies a statement or statements about the defendant;
2. That the statements were false in a material respect;
3. That the plaintiff knew of the falsity of the statements, or acted with a reckless disregard for their truth;
4. That the statements reflected adversely upon the defendant's character, integrity, good name and standing in the community in that the statements impugned his credit worthiness;
5. That the defamatory statements caused damage to the defendant; and
6. The nature and extent of the damages, and the dollar amounts thereof.

At trial, Duerner presented sufficient evidence of false and reckless representations by S.L.F.I. to credit reporting agencies, and damages incurred by Duerner as a result of those representations, to justify submitting the

defamation claim to the jury. First, S.L.F.I. provided inaccurate information to credit reporting agencies regarding Duerner's debt, even after Duerner provided S.L.F.I. with evidence of his payments on the debts. Second, S.L.F.I. knew Duerner's accounts were paid in full when it obtained a judgment against Duerner for the amount of the debt. Third, with knowledge that Duerner's accounts were paid in full, S.L.F.I. added both of the accounts and the judgment back onto Duerner's credit report. These false credit reports resulted in Duerner being unable to refinance his home or buy a new home. We hold that the district court did not err in denying S.L.F.I.'s motion for directed verdict with respect to Duerner's counterclaim for defamation.

V.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY.

S.L.F.I. contends that the district court abused its discretion in submitting the issue of punitive damages to the jury with respect to the F.D.C.P.A. claim, the F.C.R.A. claim, and the defamation claim. Because the jury did not award any punitive damages under either the F.D.C.P.A. or the F.C.R.A., error, if any, by the district court is harmless. *See McLean v. City of Spirit Lake*, 91 Idaho 779, 785, 430 P.2d 670, 676 (1967). Therefore, we will consider on appeal only the submission of the issue of punitive damages with respect to the defamation claim.

A. Standard of Review

The trial court has discretion in deciding whether to submit the issue of punitive damages to the jury. *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 611, 726 P.2d 706, 723 (1986) (citing *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 904-05, 665 P.2d 661, 669 (1983)). When reviewing the trial court's decision to submit the issue of punitive damages, we focus on the sufficiency of the evidence. *Hoglan v. First Sec. Bank of Idaho, N.A.*, 120 Idaho 682, 687, 819 P.2d 100, 105 (1991). The Court in Hoglan stated:

> An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed "malice, oppression, fraud or gross negligence;" "malice, oppression, fraud, wantonness;" or simply "deliberate or willful."

Id. (quoting *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983)). On appeal, we will not disturb the trial court's decision unless there was an abuse of discretion, which has been interpreted within the punitive damages context to mean whether there was substantial evidence to support submission of the issue to the jury. *Spence v. Howell*, 126 Idaho 763, 772, 890 P.2d 714, 723 (1995) (citing *Garnett v. Transamerica Ins. Servs.*, 118 Idaho 769, 781, 800 P.2d 656, 668 (1990)).

B. Defamation

S.L.F.I. asserts that the district court should not have submitted the issue of punitive damages to the jury on the defamation claim for three reasons. First, S.L.F.I. contends there was insufficient evidence to justify awarding punitive damages against S.L.F.I. as a corporate entity. S.L.F.I. asserts that all of the errors committed by S.L.F.I. were committed by individual employees, and that is not a sufficient basis upon which to award punitive damages against a corporation. We find that there is sufficient evidence in the record from which the jury could find that S.L.F.I., as a corporation, acted in a way which constituted an extreme deviation from reasonable conduct. A corporation is liable for punitive damages based upon the acts of its agents if the directors and managing officers participated in, or authorized or ratified, the agents' acts. *See Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 54, 830 P.2d 1185, 1192 (1992) (citations omitted); *Openshaw v. Oregon Auto. Ins. Co.*, 94 Idaho 335, 338, 487 P.2d 928, 931 (1971) (citations omitted). S.L.F.I.'s Deputy Director, Administrative Manager, and Default Collections Supervisor made false representations regarding Duerner's debt, and acknowledged and supported their employees in making false representations regarding Duerner's debt. Therefore, the record provides sufficient evidence to justify the jury's awarding punitive damages against S.L.F.I.

Second, S.L.F.I. claims there was insufficient evidence from which the jury could calculate S.L.F.I.'s net worth. However, Duerner entered into evidence S.L.F.I.'s audited financial statement and quarterly/annual report. Both of

these documents provided sufficient information from which the jury could calculate S.L.F.I.'s net worth.

Third, S.L.F.I. argues that the district court erred in admitting evidence other than S.L.F.I.'s net worth for consideration by the jury in awarding punitive damages. S.L.F.I. did not object on this basis in the district court. This Court will not consider an issue raised for the first time on appeal. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 720, 918 P.2d 583, 589 (1996) (citing *Viveros v. Department of Health & Welfare*, 126 Idaho 714, 716, 889 P.2d 1104, 1106 (1995)). Therefore, we will not determine whether the district court erred in admitting evidence other than S.L.F.I.'s net worth for consideration by the jury in awarding punitive damages.

We hold that the district court did not abuse its discretion in submitting the issue of punitive damages to the jury with respect to the defamation claim.

VI.

THE DISTRICT COURT DID NOT ERR IN GIVING JURY INSTRUCTION NO. 7, WHICH INSTRUCTED THE JURY ON THE EFFECT OF A CREDITOR ERRONEOUSLY RETURNING A PROMISSORY NOTE TO A DEBTOR.

S.L.F.I. contends that the district court erred in giving Jury Instruction No. 7, which instructed the jury on the effect of a creditor erroneously returning a promissory note to a debtor. The instruction read:

> There is no dispute that the plaintiff Student Loan Fund of Idaho told the defendant Jeffrey Duerner in writing that all of his notes had been

> paid, and returned to him the original of each of the notes clearly marked "Paid in full." These actions constitute a release of all claims against the defendant in this case, whether the notes were actually paid or not, unless the plaintiff proves that its actions in returning the notes was a mistake.
>
> In order to be relieved of the consequences of a voluntary release upon the grounds of mistake, the plaintiff Student Loan Fund of Idaho has the burden of proof to establish the existence of a material mistake that goes to the heart of the action. It must be an excusable mistake – also referred to as an honest mistake – which means that it was made despite the existence of reasonable precautions being taken and reasonable attention being devoted to avoid such errors. The mistake must be a matter that would justify one from concluding that if the mistake had not been made, no reasonable person would have taken the action that was taken in this case, and that, as a reasonable person, the party making the mistake should be excused.
>
> You will be asked the following question on the jury verdict form: Is the plaintiff relieved from the consequences of the release of obligations it delivered to the defendant by reason of a mistake? You must answer this question "no" unless you find that the plaintiff has proved that its actions were the consequences of a mistake as defined in this instruction.

S.L.F.I. argues that the jury instruction erroneously placed both the burden of proof and the burden of going forward on S.L.F.I. On appeal, we review jury instructions as a whole to determine whether they "fairly and

adequately present the issues and state the applicable law." *Lawton v. City of Pocatello*, 126 Idaho 454, 462, 886 P.2d 330, 338 (1994). If an instruction misleads the jury or prejudices one of the parties, reversible error occurs. *Id.*

Jury Instruction No. 7 instructs the jury on the meaning of I.C. § 28-3-604. I.C. § 28-3-604 permits a creditor to discharge a debtor's obligation through an intentional voluntary act, such as surrendering the instrument to the debtor. If an instrument has been returned by a creditor to the debtor, the creditor can present evidence that the surrender of the instrument was not an intentional voluntary act and, therefore, the obligation is not discharged. The creditor, here S.L.F.I., bears the burden of establishing a mistake in the return of the instrument to the debtor. Jury Instruction No. 7 correctly reflects this principle of law. We hold that the district court did not err in giving Jury Instruction No. 7.

VII.
THE DISTRICT COURT DID NOT ERR IN DENYING S.L.F.I.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL.

S.L.F.I. contends that the district court erred in denying its motion for judgment notwithstanding the verdict and motion for new trial. This Court does not assume error on appeal; rather, the party assigning error must affirmatively show it. *Jones v. Jones*, 117 Idaho 621, 625, 790 P.2d 914, 918 (1990) (citing *Weaver v. Sibbett*, 87 Idaho 387, 392-93, 393 P.2d 601, 604 (1964)). The appellant has the responsibility to include exhibits and transcripts of hearings in the record before the appellate court. *Id.*

(citing *Dawson v. Eldredge*, 89 Idaho 402, 405 P.2d 754 (1965)). When the record on appeal does not contain the evidence taken into account by the district court, "we must necessarily presume that the evidence justifies the decision and that the findings are supported by substantial evidence." *Id.* (quoting *Nash v. Hope Silver-Lead Mines*, 79 Idaho 137, 142, 314 P.2d 681, 683 (1957)).

In this case, the district court's order denying S.L.F.I.'s motion for judgment notwithstanding the verdict and motion for new trial refers to the court's oral findings and ruling as the basis for its decision. However, S.L.F.I. has failed to include the transcript of the hearing on those motions in the record on appeal. Furthermore, S.L.F.I. does not indicate, either in its original motion for new trial or in its appeal of the court's denial of this motion, the applicable provisions of I.R.C.P. 59(a) upon which it is relying. Because S.L.F.I. has failed to provide this Court with an adequate record of the district court's proceedings concerning its motion for judgment notwithstanding the verdict and motion for new trial, we will presume that the findings of the district court justified the court's denial of S.L.F.I.'s motions.

VIII.

THE DISTRICT COURT DID NOT ERR IN CONSIDERING THE AMOUNT OF THE ENTIRE JUDGMENT, INCLUDING COSTS AND ATTORNEY'S FEES, IN CALCULATING THE REQUIRED BOND FOR STAYING EXECUTION OF THE JUDGMENT PENDING APPEAL.

Pursuant to I.A.R. 13(b)(15), the district court will stay execution of a judgment pending appeal upon the posting of a bond "in the amount of the judgment or

order, plus 36% of such amount." The only issue on appeal is whether I.A.R. 13(b)(15) requires costs and attorney's fees to be included in the "amount of the judgment" for the purpose of determining the required bond. S.L.F.I. contends that the "amount of the judgment" refers only to the substantive judgment, and does not include any costs or attorney's fees awarded by the district court. Duerner contends that the "amount of the judgment" refers to all money judgments and orders, including those relating to costs and attorney's fees. On issues of law, we exercise free review. *Hummer v. Evans*, 129 Idaho 274, 279, 923 P.2d 981, 986 (1996) (citing *Ausman v. State*, 124 Idaho 839, 841, 864 P.2d 1126, 1128 (1993)).

In calculating the required bond for staying execution of a judgment pending appeal, the trial court should look to the amount of the judgment as of the time the notice of appeal was filed because that is the time at which the bond is set. Here, the judgment as of the time S.L.F.I. filed its notice of appeal included an award of costs and attorney's fees. Therefore, the district court properly required S.L.F.I. to post a bond for 136% of the entire judgment, including costs and attorney's fees.

IX.

S.L.F.I. IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON APPEAL.

Because we affirmed the district court's rulings with respect to the issues on appeal, S.L.F.I. is not entitled to an award of attorney's fees on appeal.

X.

DUERNER IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON APPEAL ONLY WITH RESPECT TO THE FAIR DEBT COLLECTION PRACTICES ACT CLAIM.

Duerner argues that he is entitled to attorney's fees on appeal pursuant to I.C. § 12-120(3) and 15 U.S.C. § 1692k(a)(3). I.C. § 12-120(3) permits the recovery of attorney's fees by the prevailing party in a civil action to recover on a note. However, there are no issues on appeal related to S.L.F.I.'s action to recover on the promissory notes. The only issues on appeal relate to Duerner's counterclaims for violations of the Fair Debt Collection Practices Act and the tort of defamation. As a result, Duerner is not entitled to attorney's fees under I.C. § 12-120(3).

Because Duerner was the prevailing party on appeal with respect to his counterclaim for violations of the Fair Debt Collection Practices Act, he may recover attorney's fees attributable to this counterclaim under 15 U.S.C. § 1692k(a)(3). However, the remainder of the appeal relates to issues surrounding the tort of defamation. Because attorney's fees are not awarded for actions in tort, we will not award Duerner any attorney's fees attributable to the defamation counterclaim.

XI.

CONCLUSION

First, we affirm the district court's denial of S.L.F.I.'s motions. Second, we hold that the district court did not err in submitting the issue of punitive damages to the jury, in giving Jury Instruction No. 7, or in calculating the amount of the bond required for staying execution of the judgment pending appeal. Third, we award Duerner attorney's fees only with respect to issues presented on appeal relating to the Fair Debt Collection Practices Act, and we award costs on appeal to Duerner.

Justices JOHNSON, SILAK, SCHROEDER and WALTERS, **CONCUR.**

EXHIBIT B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STUDENT LOAN FUND OF IDAHO, INC. a non-profit Idaho corporation, Plaintiff, vs. JEFFREY W. DUERNER, Defendant.	Case No. CV-OC-95-02576*D MEMORANDUM DECISION (Filed March 26, 1996)

Introduction

Before the court are cross motions for summary judgment filed by the Plaintiff, Student Loan Fund of Idaho (SLFI), and Defendant, Jeffrey Duerner. This action was initiated by SLFI for the purpose of recovering sums allegedly due from Duerner on four student loans. Duerner's answer asserts that all loans have been paid in full. He further contends that SLFI waived its claims, and that SLFI has improperly consolidated Duerner's loans. Duerner has also brought a counterclaim alleging violations of two federal debt collection acts and various state tort actions arising from improper debt collection.

Duerner moves for summary judgment to determine whether SLFI has waived its claim to debts owed to it by Duerner, whether SLFI improperly consolidated Duerner's loans, whether the Federal Fair Debt Collection Practices Act (FFDCPA), or the Federal Fair Credit Reporting Act (FFCRA) applied to SLFI, and whether SLFI is subject to the alleged state law claims.

SLFI moves for judgment on the pleadings, or in the alternative, summary judgment.

Concerning the pending motions, I conclude there are questions of fact regarding the issues of waiver of the debt and improper consolidation. I find SLFI is subject to the FFDCPA and the FFCRA. I find questions of fact regarding whether the SLFI violated the FFCRA. Finally, I find that SLFI is subject to the state law claims alleged, except for the state law claims of conversion, violation of I.C. code 28-43-211 and breach of the implied covenants of good faith and fair dealing. SLFI is not entitled to judgment on the pleadings, nor is it entitled to a summary judgment on any issue contained in the complaint. I therefore generally deny both motions, except that I will dismiss the state law counts for conversion, violation of I.C. § 28-43-211, and breach of the implied covenants of good faith and fair dealing, as stated above.

Facts and Procedural History

Between 1979 and 1982 Duerner obtained $4,000.00 in student loans as follows:

> Sept. 12, 1979 Idaho First National Bank $500.00 March 21, 1980 Idaho First National Bank $1000.00 January 4, 1982 First Security Bank $2000.00 April 13, 1982 First Security Bank $500.00

All four loans were guaranteed by SLFI.

In 1983 Duerner defaulted on the First Security loans, and SLFI paid First Security the amounts due under its guarantee. First Security transferred the loans to SLFI, which instituted collection proceedings against Duerner.

Duerner claims that in 1984 he paid $2,500.00 to SLFI to pay off the two notes from First Security. Duerner claims that he made the payment to SLFI in the form of money orders that he bought at Buttrey's, a local grocery store in Nampa, which is no longer in business. Duerner claims that he does not have the receipt for these money orders, nor can he obtain them from Buttrey's since it is no longer in business. SLFI did not provide Duerner with a receipt. SLFI claims it can find no record of this payment.

Later, in 1984 Duerner defaulted on the two student loans due the Idaho First National Bank. Upon default, SLFI paid Idaho First National Bank the sums due, and these notes were transferred to SLFI.

In 1987 SLFI instituted suit against Duerner for all four loans. After he was served with this suit, Duerner contacted SLFI and asked what his "payoff" amount was. SLFI replied that the payoff amount was $1,769.84. Duerner sent a check for $1,769.84 to SLFI. Duerner claims that he thought he was paying off the Idaho First notes. Duerner also claims that since he believed he had already paid SLFI $2,500 towards the First Security Loans, he believed this payment of $1,769.84 was paying off the entire debt owed to SLFI. Apparently, he thought this would resolve the lawsuit, and he did not file an answer or appearance in the litigation.

SLFI obtained a default judgment against Duerner for $6,572.53.00, without giving credit for any payments made thus far. In 1990 Duerner contacted SLFI and was told that the entire debt could be paid off for $70.00. Duerner then drove to SLFI headquarters and paid the

$70.00. Duerner then received a letter from SLFI informing him that his obligation to them was paid in full. The letter enclosed all four promissory notes stamped "paid in full."

SLFI claims that Duerner never paid $2,500 towards the First Security notes as he claims he did. SLFI asserts that a computer error led it to stamp the notes "paid" and return them to Duerner. SLFI contends while transferring data from one computer system to another, the account maintained for Duerner's defaulted First Security Bank notes was lost in the data conversion.

In 1993 the default judgment was set aside. SLFI then filed an amended complaint, giving Duerner credit for the payments of $1769.84 and $70.00, and another payment of $30 made sometime during the course of litigation, but not the $2,500 Duerner claims was made in 1984. SLFI's amended complaint prayed for a principal amount due of $3,279.78. A second default judgment was taken. That judgment was also set aside. Duerner then obtained new counsel and filed responsive pleadings, including his counterclaim.

Argument

1. The Federal Fair Debt Collection Practices Act (FDCPA) applies to SLFI.

In count one of Duerner's amended counterclaim he alleges SLFI committed multiple violations of the Fair Debt Collection Practices Act 15 U.S.C. 1692 et seq. (Hereinafter, "Fair Practices Act.") Duerner moves for partial summary judgment seeking a determination that SLFI is

subject to the Fair Practices Act. SLFI counters, moving for summary judgment dismissing any claims under the Fair Practices Act, because it claims it is not a debt collector for purposes of the Fair Practices Act. The Act defines debt collector to mean:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another . . . 15 U.S.C. 1692a(6).

I find that SLFI is a debt collector under the Fair Practices Act. From the material submitted, it is clear that SLFI's principle [sic] business and major source of revenue is in the acquisition and collection of delinquent loans which are owing to other banks and which have gone into default.

> The easiest way I could explain SLFI is to compare it to an insurance company and a collection agency, because that's primarily what we do. We do everything in the middle, assistance for borrowers who get delinquent, review claims, pay claims, death, default, disability, bankruptcy claims. We're a collection agency and collect on those claims . . . Deposition of Barbara Higinbotham, deputy director of SLFI, page 11.

SLFI argues that its principal purpose is not debt collecting, but rather providing statutorily created loan guaranties and loan servicing. I disagree. As I understand, SLFI does not provide any loan servicing to an [sic] lender prior to default. While SLFI may provide loan guaranties, I am convinced that this part of their business

is just a precursor to the principal part of their business, which is collecting defaulted student loans. SLFI's own employee testified that SLFI does not become actively involved with student debts until the debts are in default.

> Q. Once there's been a default, then the Student Loan Fund (SLFI) becomes actively involved; is that correct.
>
> A. Yes.
>
> Q. From that point on, is that what you would generally term as the business of SLFI regarding collections?
>
> A. Yes.
>
> Q. Up until the default, you act as a guaranty agency?
>
> A. Right.
>
> Q. Once there's been a default, then you act in terms as a collection agency.
>
> A. Yes.
>
> Deposition of Barbara Higinbotham, deputy director of SLFI, page 13.

Regarding this specific case, the material presented shows that SLFI's principal business, moveover its only, business with Duerner involved collection of the defaulted debts.

> After said student loans became due, the defendant defaulted on said student loans in that he did not make payments as required by the terms and conditions of said promissory notes. Said notes were thereafter assigned to the Plaintiff (SLFI) herein.

Amended Complaint page 3.

Q. When Mr. Duerner's student loans were first made to him by the various lending institutions, would SLFI have had any dealings with regard to those loans until there was a default?

A. In this particular case, no.

Barbara Higinbotham deposition page 14.

SLFI urges the court that *Fisher v. Unipac Service Corp.*, 519 N.W.2d 793 (Iowa 1994), is persuasive. In *Fisher* the court held that the collection efforts by holders of federally insured student loans or their servicing agencies were not the type of activity congress intended to regulate (by the Fair Practices Act). *Fisher* at 800. I find *Fisher* to be distinguishable from the situation here. In *Fisher* the court found that the loan was not in default when the loan servicing company in question, UNIPAC, began servicing the loan. *Id.* at 799. The court found that UNIPAC had assumed all record keeping and servicing functions for Fisher's loans on behalf of Sallie Mae and that the student did not default until four years later. The court found that UNIPAC's primary business purpose was not debt collection because it found UNIPAC had taken on the loan, and had been providing numerous services on the loan, for 4 years prior to default. *Id.* I think the ruling in *Fisher* would only apply to loan servicing agencies such as UNIPAC that take on the loans before default. Here, as admitted by SLFI's employee, it is evident that in general SLFI does not become actively involved with student loans until after default. Deposition of Barbara Higinbotham, deputy director of SLFI, page 13. And, specifically in Duerner's situation it is undisputed that SLFI did not have any dealings with Duerner's loans

until after the loans were in default. Deposition of Barbara Higinbotham page 14. Therefore, I conclude that the Fair Practices Act applies to SLFI because its principal business purpose, generally, and specifically in this case, is debt collecting.[1] However, even if SLFI's sole principal business purpose was not debt collection, it could still be considered a debt collector under the Fair Practices Act. Because of the statute's use of a disjunctive in the definition, a debt collector is not limited to only those whose principal business is debt collection. A debt collector can also be anyone who regularly collects, or attempts to collect debts owed to another.

> The term debt collector means any person who uses any instrumentality of interstate commerce or the mails of any business the principal purpose of which is the collection of any debts, *or* who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C.A. sec. 1692a(6).

Regularly is defined as normally, usually or customarily. *Games v. Cavazos*, 737 F. Supp. 1368, 1385 (D. Del. 1990). It is undisputed that debt collection is a regular activity of SLFI.

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[1] SLFI also contends that one set of the loans was assigned prior to default and serviced by Student Loan Fund of Idaho Marketing Association (SLFIMA). However this makes no difference since an affidavit of an SLFI employee indicates that SLFI and SLFIMA are two separate corporations. No facts have been presented to establish an intimate relationship between the two.

SLFI argues that this part of the definition does not apply to it because SLFI does not collect debts for another but rather for itself. SLFI claims it is not collecting the debts of another because after it purchased Duerner's notes it owned the notes and collected them as an assignee.

I disagree with SLFI's argument. Looking to the legislative history of the Fair Practices Act, I think the definition was crafted only to exclude collection efforts by parties who originated the loans, or who acquired the loans from the originator for investment and prior to any indicia of delinquency or default.

> The committee does not intend the definition to cover the activities of . . . the collection of debts such as mortgages and student loans, *by persons who originated such loans.* [Emphasis mine.] U.S. Cong. and Admin. News Vol 26 page 1695, 1698 Senate Report No. 95-382.

That is not the case here. The debts which SLFI generally collects, and specifically Duerner's debt, originated with banks, not SLFI. SLFI did not acquire the loans for investment nor provide any services on these loans prior to the time they became delinquent. With respect to it [sic] business generally, and Duerner in this case, and with the exception of providing the loan guarantees to the participating banks, SLFI had no involvement in the transactions except for debt collection activities. As such, it is covered by the Act. *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D.Ala. 1987).

2. A question of fact remains regarding whether SLFI is in violation of the federal Fair Credit Reporting Act.

In Duerner's counterclaim he alleges that SLFI violated the federal Fair Credit Reporting Act 15 U.S.C. 1681 (herein after the Reporting Act), by engaging in an impermissible use of credit reports. Duerner claims that SLFI wrongly obtained his credit reports for the sole purpose of defending against Duerner's counterclaim. Duerner moves for summary judgment on this issue, requesting this court to determine that as a matter of law SLFI is subject to and liable for violations of the Reporting Act. SLFI argues that the Reporting Act does not create a cause of action against SLFI because although it did obtain credit reports on Duerner, and the reports were used to defend against the counterclaim, this use was permissible because of the underlying debt collection action SLFI was pursuing against Duerner.

I conclude the Reporting Act may apply, but it is a question of fact regarding whether SLFI's "heart was pure", when it requested the two credit reports.

The question of whether consumer information has been obtained wrongly is determined with reference to the permissible purposes for which consumer reports may be obtained under section 1618b of the Reporting Act. *Zeller v. Samia*, 758 F. Supp. 775 (D.Mass. 1991). 15 U.S.C. § 1681(b) establishes the permissible uses of consumer credit reports, and the provision that SLFI contends should be applied is 15 U.S.C. § 1681(b)(3)(a):

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other: . . .

> (3) To a person which it has reason to believe –
>
> (a) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

If a user requests information from a consumer reporting agency for a purpose not permitted by the Reporting Act while representing to the agency that the report will be used for a permissible purpose, the user may [sic] liable under the act. *Zeller*, at 781.

From the regulations, it seems clear that any interest SLFI had in obtaining reports for the purpose of pursuing Duerner's debt was a permissible purpose for obtaining the reports under the Reporting Act. In fact, The Federal Trade Commission regulations provide that an attorney may obtain a consumer credit report when suing on a debt.

> An attorney collecting a debt for a creditor client including a party suing on a debt has a permissible purpose to obtain a consumer report on the debtor to the same extent as the client. 16 C.F.R. Part 600.

But, Duerner claims that SLFI did not obtain the reports pursuant to the permissible purpose of collecting Duerner's debt. Duerner claims instead, that SLFI obtained the reports for the sole purpose of defending against Duerner's counterclaim, which alleged that SLFI had transmitted false information and damaged Duerner's credit.

If this was the sole purpose, the purpose would be impermissible. The question of fact arises because SLFI claims that the information was requested for the permissible purpose of collecting Duerner's debt, and for the purpose of defending against the law suit. Case law does support the proposition that if the a [sic] credit report is originally obtained for a permissible purpose, it may be permissible to use it for other purposes. *Zeller v. Samia*, 758 F. Supp. 775 (D. Mass 1991).

Cindy Erickson, the SLFI employee who obtained the credit reports, stated the following in her affidavit:

> The reports were obtained for the purpose of obtaining information in connection with the debt collection process, and for the purpose of obtaining precise information as to the manner in which the account was being reported by those agencies, in view of Mr. Duerner's contention that the account was being improperly or incorrectly reported as a delinquent obligation. Affidavit of Cindy Erickson February 6, 1996, page 2.

I reject SLFI's argument that so long as a credit transaction existed, it could request a full credit report for any reason it wanted. Therefore, an issue of fact remains to be litigated over whether or not SLFI ordered these reports for a permissible purpose under the Reporting Act.

3. A question of fact remains regarding whether or not SLFI's return and cancellation of the notes constituted waiver of their opportunity to collect the debt from Duerner.

The facts are undisputed that SLFI sent Duerner a letter acknowledging that his accounts were paid in full and returned the four original promissory notes stamped "paid in full." Duerner argues that according to Idaho Code § 28-3-604, the return and cancellation of the notes discharges his obligation. Idaho Code § 28-3-604 provides:

> Discharge by cancellation or renunciation. – (1) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

SLFI argues that I.C. § 28-3-604 requires an intentional act to discharge the obligation of the debtor, and in this case the return of the notes and designation of the account occurred by reason of mistake. This issue has not be [sic] litigated in Idaho. Other jurisdictions hold that an act of cancellation or renunciation of the debt by return of the instrument or notation thereon is nevertheless ineffective if done unintentionally or by reason of mistake. *Reid v. Cramer*, 603 P.2d 851 (Wash. App.): *Columbia Sav. v. Zelinger*, 794 P.2d 231, 235 (Colo. 1990), quoting *Ohio*

Casualty Insurance Co. v. Yaklich, 768 P.2d 1274, 1275 (Colo. App. 1989).

SLFI contends the mistake occurred during a conversion to a new computer system. SLFI contends that the computer records for Duerner's account with First Security Bank were lost in the data conversion. Later, SLFI instituted research on the account and determined that through the computer conversion error, this account had not been carried over to the current accounting system. It claims that it released the notes and the letter under the mistaken belief that the First Security notes had been paid, when they had not.

I conclude that the letter and the return and cancellation of Duerner's notes are certainly evidence of discharge or renunciation, which is the basis of the claims of waiver and estoppel. However, in view of SLFI's contention that the circumstances were all errors and mistakes, it is not conclusive. I hold that a question of fact remains and deny summary judgment as to this issue.

4. SLFI's consolidation of Duerner's loans makes a difference in the amount Duerner must pay, and whether the consolidation was improper is a question of fact.

It is undisputed that Duerner had four promissory notes, two notes to Idaho First for $1,500 and $500, and two to First Security for $2,000 and $500. At some point during its management of these loans after default, SLFI compiled all the notes into one account. Duerner contends the accounts were consolidated without his permission and that this is significant because the consolidation

increased the amount he had to pay. In 1987 Duerner remitted enough money to pay off the two Idaho First promissory notes of $1,500. Duerner contends that at this time, he his [sic] was paying off all debt with SLFI because he claims that he had paid $2,500 towards the First Security note three years earlier. Duerner claims that if the notes had not been consolidated, then regardless of whether or not he had paid the First Security notes, there could be absolutely no further accrual of interest on the two Idaho First notes after 1987 and during the intervening nine and one-half years that action has persisted.

Duerner claims that because of the consolidation SLFI applied the 1987 payment of $1500, plus interest, to what they perceived to be the total due, proceeding as if the $2,500 (First Security notes) had never been paid. Duerner claims the result of the improper consolidation is that even if it is determined that he did not pay the 2,500 (First Security note), the principal owing is claimed to be $3,279.78 instead of $2,500, based on the interest that was allowed to accrue on the Idaho First notes, 1,500 after they were supposed to be paid off in 1987. Duerner seeks a ruling that the two Idaho First notes are paid off, and that SLFI may only pursue action on First Security. notes, and that accrued interest must be recalculated accordingly.

SLFI admits that Duerner has paid enough to pay off two of the notes.

> There is no doubt that on August 26, 1987, Duerner obtained a loan from his credit union, and $1,769.84 of the proceeds were remitted to SLFI. That amount, of course, was entirely consistent with the principal and accrued interest

> due on the loan originated with Idaho First National Bank, in the initial principal amount of $1,500. Plaintiff's brief in opposition to summary judgment page 10.

SLFI also admits that it aggregated all the notes into a single account. SLFI asserts that because interest rates (7%) were identical on all the notes, the aggregation did not make a difference in the sums due to SLFI.

I conclude that the aggregation does make a difference in the sums due. If the 1987 payment of $1,769.84 paid off the Idaho First notes, then only $2,500 (First Security notes) could remain outstanding and accruing interest. Accruing interest at the lower level of principal over the years since 1987 would make a significant difference. However, the question of whether the consolidation and application of payments in the case was wrong is a question of fact. Ordinarily, a creditor is obligated to apply payments as the debtor directs, and if no direction is given, the creditor is [sic] may apply the payments any way it wishes. Duerner says he thought he was paying off the whole thing. If the jury accepts that all the loans have been paid off then it is immaterial how the payments were applied. However, if the jury believes that there is still something due, it may be because they disbelieve Duerner's contention that he paid $2,500 against the First Security loans in 1984. In this is so, the jury may find that SLFI could apply the 1987 payment of $1769.84 any way it wanted.

5. SLFI is generally subject to state law claims.

In Duerner's amended counterclaim he alleges various state law claims, including defamation conversion, violations of the Idaho Credit Code and breach of the covenant of good faith and fair dealing. Duerner requests a ruling that SLFI is subject to the alleged state law claims. SLFI countered by moving for judgment on the pleadings, making specific arguments why each state law claim should be dismissed. I conclude that SLFI is generally subject to state law claims except the common law tort of conversion, and violating the Idaho Credit Code by not providing a receipt for a money order.

a. The Higher Education Act does not preempt claims for libel or slander.

In count two of Duerner's amended counterclaim he alleges SLFI is liable for defamation because it falsely reported to credit agencies the account of Duerner as an uncollected account, and as an account to which there was an outstanding judgment. Duerner requests a ruling that a state law claim for defamation is not preempted by the Higher Education Act. SLFI requests a ruling that the defamation claim against them be dismissed because the defamation claim is preempted by the Higher Education Act.

I conclude that a state law claim for defamation is not preempted by the Higher Education Act. Therefore, I deny SLFI's motion to dismiss this claim. The Higher Education Act is found at 20 U.S.C. § 1078. The regulations adopted by the federal Department of Education

with regard to the Higher Education Act are found at 34 C.F.R. 682.411. 34 C.F.R. 682.411 requires due diligence by lenders in the collection of guarantee agency loans. 34 C.F.R. 682.411(d) provides that part of the lender's due diligence in attempting to collect the debt involves warning the delinquent debtor that his delinquent account will be reported to all national credit bureaus and that the agency may bring suit against the borrower. 34 C.F.R. 682.411(n) provides that the provisions of this section preempt any state law including state statutes, regulation, or rules, that would conflict with or hinder satisfaction of the requirements or frustrate the purpose of this section.

SLFI argues that since it is required by 34 C.F.R. 682.411(d) to report defaulting borrowers to a credit reporting agency, subjection to state defamation claims for such an act stands as an obstacle to the purposes and objectives of the statute and therefore is implicitly preempted by 34 C.F.R. 682.411(n). SLFI argues that permitting maintenance of tort actions under state law would encourage loan guaranty agencies to undertake only the most minimal of "due diligence"and compliance with its statutory and contract obligations to collect the loans, which would increase the amount of reinsurance claims it makes to the government.

I disagree with SLFI's interpretation. I find that the objectives of due diligence required by 34 C.F.R. 682.411 can be met within the parameters of the law against defamatory statements. Certainly, the federal act would provide a defense to a defamation claim based on false light or invasion of privacy, but I see no reason to immunize the entity from liability for slanderous statements disseminated to a credit reporting agency.

b. The alleged mishandling of the IRS offset is not actionable under the tort theory of conversion.

In count three of Duerner's amended counterclaim he alleges that SLFI is liable in tort for conversion because it wrongfully converted and withheld Duerner's 1992 income tax refund. Duerner requests a ruling that SLFI is subject to a state law claim for conversion. SLFI moves to dismiss this claim arguing that the elements of conversion are not present and that SLFI is immune from suit because, as an agent for the Department of Education, it partakes of the sovereign immunity granted by 26 U.S.C. § 6402 (e), which precludes review in a tort proceeding of the offset of a tax refund under federal programs.

I agree with SLFI and dismiss Duerner's claim of conversion. I conclude that the alleged mishandling of the IRS offset did not amount to a conversion on the part of SLFI, and that SLFI is not subject to suit on this theory in any event.

The elements of conversion are (1) an act of dominion or control over the personal property of another; (2) wrongfully exerted; and (3) inconsistent with, or in denial of the rights of the owner. *Greenwade v. Idaho State Tax Commission*, 119 Idaho 501, 503 n.1 (Ct. App. 1991). SLFI's diversion of the tax refund did not amount to a conversion. To show conversion Duerner would first have to show that SLFI exercised an act of dominion or control over his personal property. The diversion of the tax refund was not a direct act of control by SLFI. As I understand the mechanism, SLFI arranged for the Department of Education to effect the IRS offset through the student loan guaranty reinsurance program. Only

federal agencies have the authority to implement the process of diverting a tax refund. 31 U.S.C. § 3720A. Duerner's complaint in this area, then, must be directed to the IRS or the Department of Education though [sic] administrative proceedings. There is no private cause of action in tort. 26 U.S.C. § 6402(e); see, *Setlech v. United States*, 816 F. Supp. 161 (E.D.N.Y. 1993).

c. Idaho Code 28-43-311 (Limitation of Attorney's Fees) is a recodification of I.C. § 28-33-514 which was in effect before Duerner's loans were issued.

In count five of Duerner's amended counterclaim he alleges that SLFI violated Idaho Credit Code § 28-43-311, limitation on attorney's fees. SLFI moves to dismiss this claim against it, arguing that the notes were drafted and executed between 1979 and 1982, prior to the enactment of I.C. § 28-43-311. I.C. § 28-43-311 is a recodification of I.C. § 28-33-514 which was in place prior to the notes being executed.

I.C. § 28-43-311 provides:

> Limitation on attorney's fees – With respect to a regulated consumer loan in which the principal is one thousand dollars or less, the agreement may not provide for the payment by the debtor of attorney's fees. A provision in violation of this section is unenforceable.

I.C. § 28-33-514 provided:

> Limitation on attorney's fees. – (1) With respect to a supervised loan in which the principal is $1,000 or less, the agreement may not provide for the payment by the debtor of attorney's fees.

> A provision in violation of this section is unenforceable.

The compiler's notes for I.C. § 28-33-514 indicate that the statute had been in effect since at least 1972.

SLFI then argues that according to I.C. § 28-45-201, actions under I.C. § 28-43-311 must be brought within two years after the violation occurred. SLFI argues that the latest of the violations, improperly drafting and enforcing the promissory notes in the amounts of $1,000 or less, occurred 16 years ago in 1982. I disagree. Any affirmative claim which might be barred by the statue [sic] of limitations may nevertheless be raised defensively, to avoid an adverse claim or as a matter of offset. *Hartwell Corp. v. Smith*, 107 Idaho 134 (Ct.App. 1984). Here, the prohibition contained in I.C. § 28-43-311 is a defense to SLFI's claim for attorney's fees. Therefore, I deny SLFI's motion to dismiss this claim.

d. I.C. § 28-43-204, requiring a receipt for any payment by a medium which does not generate a receipt, does not apply to money orders.

In count five of Duerner's amended counterclaim he alleges that SLFI violated Idaho Credit Code § 28-43-204 by failing to provide receipts for payments or statements of account after Duerner allegedly paid $2,500 towards his debt with money orders. SLFI argues that this claim should be dismissed because the statute only requires a receipt for those methods of payment which do not themselves generate a receipt. I agree. I.C. § 28-43-204 provides:

> The creditor shall deliver to the debtor, without request, a written receipt for each payment by coin or currency on an obligation pursuant to a regulated consumer credit transaction.

I disagree with Duerner's argument that a money order is the same as cash. The obvious purpose behind the statute was to require production of receipts for mediums of payment which do not self produce receipts. A money order, unlike coin or currency creates a receipt. Therefore, I grant SLFI's motion and dismiss this claim.

Conclusion and Order

For the reasons stated, I find questions of fact regarding the issues of renunciation, release and waiver of the debt and improper consolidation. I find SLFI is subject to the FFDCPA. I find questions of fact regarding whether the SLFI violated the FFCRA. Finally, I find that SLFI is subject to the state law claims alleged, except for the state law claims of conversion and violation of I.C. code 28-43-211.

The counterclaim counts alleging common law conversion and violation of Idaho Code § 28-43-204 are dismissed. In all other respects both motions are denied. This memorandum may serve as the order of the court.

It is so ordered.

Dated this 26th day of April, 1996.

/s/ D. Duff McKee
D. Duff McKee, District Judge

EXHIBIT C

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Attorneys for Defendant/
Counterclaimant

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR
THE COUNTY OF ADA

STUDENT LOAN FUND OF IDAHO, INC., a non-profit Idaho corporation,	Case No. CV OC 9502576D
Plaintiff/ Counterdefendant,	ORDER
-vs-	
JEFFREY W. DUERNER,	(Filed Aug. 5, 1996)
Defendant/ Counterclaimant.	

This matter came on for hearing on July 30, 1996, before the Honorable D. Duff McKee, District Judge, upon Plaintiff's Motion for Judgment Notwithstanding the Verdict and Motion in the Alternative for New Trial and on Plaintiff's Motion to Disallow Attorneys' Fees. Plaintiff appeared by and through its attorneys of record, Gary L. Montgomery and Wilbur Nelson, and Defendant

appeared in person and by and through his attorney of record, Jean R. Uranga. Based upon the argument of counsel, the pleadings and records on file herein, and the oral findings and ruling of the Court,

IT IS HEREBY ORDERED That Plaintiff's Motion for Judgment Notwithstanding the Verdict and Motion in the Alternative for New Trial is denied.

IT IS FURTHER ORDERED that Defendant is awarded costs of $2,257.44 pursuant to Rule 54(d)(1), I.R.C.P., and the $222.50 of Teresa Pulliam's expert witness fee which is over the $500 set forth in the Rule as costs of right is approved and awarded pursuant to Rule 54(d)(1)(D), I.R.C.P.

IT IS FURTHER ORDERED that, pursuant to Idaho Code §§ 12-120(1) and (3) and 15 U.S.C. § 1692k, Defendant is awarded attorney fees against Plaintiff in the amount of $1,775 for attorney fees paid to Steve Adamson and $25,000 for service provided by Jean Uranga and Rick Dredge. Fees incurred for legal services provided by Jean Uranga and Rick Dredge have been reduced by $4,750.50 due to the fact that a portion of the judgment obtained by Defendant was based upon the tort claim of defamation for which there is no statutory provision for attorney fees and the Court expressly finds that Idaho Code § 12-121 would not support an award.

DATED This 5th day of August, 1996.

/s/ D. Duff McKee
D. Duff McKee
District Judge

EXHIBIT D

In the Supreme Court of the State of Idaho

STUDENT LOAN FUND OF IDAHO, INC.,	)	ORDER
Plaintiff-Counterdefendant-Appellant,	)	DENYING
	)	PETITION FOR
v.	)	REHEARING
	)	No. 23262
JEFFREY W. DUERNER,	)	Ref. No. 98RH-1
Defendant-Counterclaimant-Respondent.	)	

The Appellant having filed a PETITION FOR REHEARING on January 20, 1998 and supporting MEMORANDUM on February 3, 1998 of the Court's Opinion released December 30, 1997; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 25th day of February, 1998.

By Order of the Supreme Court

/s/ Lois Dawson
Lois Dawson,
Chief Deputy Clerk for
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge D. Duff McKee

EXHIBIT E

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

15 U.S.C. § 1692 *et seq.* (1994):

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes,

whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owned or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting tc collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall –

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

(a) Communication with consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of

a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt –

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate at postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if

otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except –

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a

debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of –

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to –

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false or deceptive means to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date of such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if –

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

(a) Any debt collector who brings any legal action on a debt against any consumer shall –

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity –

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

§ 1692k. Civil Liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors –

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 16921 Administrative enforcement

(a) Federal Trade Commission

Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section. For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Compliance with any requirements imposed under this subchapter shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of –

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act [12 U.S.C. §§ 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act, by the National Credit Union Administration Board with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter.

§ 1692m. Reports to Congress by the Commission

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Commission under section 1692*l* of this title.

(b) In the exercise of its functions under this subchapter, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692*l* of this title.

§ 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not

inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

§ 1692o. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Commission determines that under the law of the State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

20 U.S.C. § 1071 (1994):

§ 1071. Statement of purpose; nondiscrimination; and appropriations authorized

(a) Purpose; discrimination prohibited

(1) Purpose

The purpose of this part is to enable the Secretary –

(A) to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions (as defined in section 1085 of this title),

(B) to provide a Federal program of student loan insurance for students or lenders who do not have reasonable access to a State or private nonprofit program of student loan insurance covered by an agreement under section 1078(b) of this title,

(C) to pay a portion of the interest on loans to qualified students which are insured under this part, and

(D) to guarantee a portion of each loan insured under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(B) of this title.

20 U.S.C. § 1078 (1994):

§ 1078. Federal payment to reduce student interest cost

(c)(2) Contents of guaranty agreements

The guaranty agreement –

* * *

(G) shall prohibit the Secretary from making any reimbursement under this subsection to a guaranty agency when a default claim is based on an inability to locate the borrower, unless the guaranty agency, at the time of filing for reimbursement, certifies to the Secretary that diligent attempts have been made to locate the borrower through the use of reasonable skip-tracing techniques in accordance with regulations prescribed by the Secretary. . . .

* * *

20 U.S.C. § 1082 (1994):

§ 1082. Legal powers and responsibilities

* * *

(g) Civil penalties

(1) Authority to impose penalties

Upon determination, after reasonable notice and opportunity for a hearing, that a lender or a guaranty agency –

(A) has violated or failed to carry out any provision of this part or any regulation prescribed under this part, or

(B) has engaged in substantial misrepresentation of the nature of its financial charges,

the Secretary may impose a civil penalty upon such lender or agency of [sic] not to exceed $25,000 for each violation, failure, or misrepresentation.

* * *

Section 682.406 of 34 C.F.R. provides in pertinent part:

§ 682.406. Conditions of reinsurance coverage.

(a) A guaranty agency is entitled to reinsurance payments on a loan only if –

(1) The lender exercised due diligence in making, disbursing, and servicing the loan as prescribed by the rules of the agency;

(2) With respect to the reinsurance payment on the portion of a loan represented by a single disbursement of loan proceeds –

(i) The check for the disbursement was cashed within 120 days after disbursement; or

(ii) The proceeds of the disbursement made by electronic funds transfer or master check in accordance with § 682.207(b)(1)(ii) (B) and (C) have been released from the restricted account maintained by the school within 120 days after disbursement;

(3) The lender provided an accurate collection history and an accurate payment history to the guaranty agency with the default claim filed on the loan showing that the lender exercised due diligence in collecting the loan through collection efforts meeting the requirements of § 682.411, including collection efforts against each endorser;

(4) The loan was in default before the agency paid a default claim filed thereon;

(5) The lender filed a default claim thereon with the guaranty agency within 90 days of default;

(6) The lender resubmitted a properly documented default claim to the guaranty agency not later than 60 days from the date the agency had returned that claim due solely to inadequate documentation, except that interest accruing beyond the 30th day after the date the guaranty agency returned the claim is not reinsured unless the lender files a claim for loss on the loan with the guarantor together with all required documentation, prior to the 30th day;

(7) The lender satisfied all conditions of guarantee coverage set by the agency, unless the agency reinstated guarantee coverage on the loan following the lender's failure to satisfy such a condition pursuant to written policies and procedures established by the agency;

(8) The agency paid or returned to the lender for additional documentation a default claim thereof filed by the lender within 90 days of the date the lender filed the claim or, if applicable, the additional documentation, except that interest accruing beyond the 60th day after

the date the lender originally filed the claim is not reinsured;

(9) The agency submitted a request for the payment on a form required by the Secretary no later than 45 days following payment of a default claim to the lender, which must take place no earlier than 90 days following default in the case of a loan payable in monthly installments, or no earlier than 30 days following default, in the case of a loan payable in less frequent installments;

(10) The loan was legally enforceable by the lender when the agency paid a claim on the loan to the lender;

(11) The agency exercised due diligence in collection of the loan in accordance with § 682.410(b)(6) or (7);

(12) The agency and lender complied with all other Federal requirements with respect to the loan including the payment of origination fees;

(13) The agency assigns the loan to the Secretary, if so directed, in accordance with the requirements of § 682.409; and

(14) The guaranty agency certifies to the Secretary that diligent attempts have been made by the lender and the guaranty agency under § 682.411(g) to locate the borrower through the use of reasonable skip-tracing techniques.

Section 682.410 of 34 C.F.R. provides:

§ 682.410. Fiscal, administrative, and enforcement requirements.

(a) *Fiscal requirements* – (1) *Reserve fund assets.* A guaranty agency shall establish and maintain a reserve

fund to be used solely for its activities as a guaranty agency under the FFEL Program ("guaranty activities"). The guaranty agency shall credit to the reserve fund –

(i) The total amount of insurance premiums collected;

(ii) Funds received from a State for the agency's guaranty activities, including matching funds under section 422(a) of the Act;

(iii) Federal advances obtained under sections 422(a) and (c) of the Act;

(iv) Federal payments for default, bankruptcy, death, disability, closed schools, and false certification claims;

(v) Supplemental preclaims assistance payments;

(vi) Administrative cost allowance payments received under § 682.407 and transitional support payments received under section 458(a) of the Act;

(vii) Funds collected by the guaranty agency on FFEL Program loans on which a claim has been paid;

(vii) Investment earnings on the reserve fund; and

(ix) Other funds received by the guaranty agency from any source for the agency's guaranty activities.

(2) *Uses of reserve fund assets.* A guaranty agency may use the assets of the reserve fund established under paragraph (a)(1) of this section to pay only –

(i) Insurance claims;

(ii) Operating costs for the agency's guaranty activities, including payments necessary in collecting loans,

providing preclaims assistance, monitoring enrollment and repayment status, and carrying out any other guaranty activities;

(iii) Lenders for their participation in a loan referral service under section 428(e) of the Act;

(iv) The Secretary's equitable share of collections;

(v) Federal advances and other funds owed to the Secretary;

(vi) Reinsurance fees;

(vii) Insurance premiums related to cancelled loans;

(viii) Borrower refunds, including those arising out of student or other borrower claims and defenses;

(ix) (A) The repayment, on or after December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency provides the Secretary 30 days prior notice of the repayment and demonstrates that –

(*1*) These amounts were originally received by the agency under appropriate contemporaneous documentation specifying that receipt was on a temporary basis only;

(2) The objective for which these amounts were originally received by the agency has been fully achieved; and

(3) Repayment of these amounts would not cause the agency to fail to comply with the minimum reserve levels provided by paragraph (a)(10) of this section, except that the Secretary may, for good cause, provide

written permission for a payment that meets the other requirements of this paragraph (a)(2)(ix)(A).

(B) The repayment, prior to December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency demonstrates that –

(*1*) These amounts were originally received by the agency under appropriate contemporaneous documentation that receipt was on a temporary basis only; and

(2) The objective for which these amounts were originally received by the agency has been fully achieved.

(x) Any other payments necessary to perform functions directly related to the agency's guaranty activities and for their proper administration;

(xi) Notwithstanding any other provision of this section, any other payment that was allowed by law or regulation at the time it was made, if the agency acted in good faith when it made the payment or the agency would otherwise be unfairly prejudiced by the non-allowability of the payment at a later time; and

(xii) Any other amounts authorized or directed by the Secretary.

(3) *Accounting basis.* Except as approved by the Secretary, a guaranty agency shall credit the items listed in paragraph (a)(1) of this section to its reserve funds upon their receipt, without any deferral for accounting purposes, and shall deduct the items listed in paragraph (a)(2) of this section from its reserve fund upon their payment, without any accrual for accounting purposes.

(4) *Accounting records.* (i) The accounting records of a guaranty agency must reflect the correct amount of sources and uses of funds under paragraph (a) of this section.

(ii) A guaranty agency may reverse prior credits to its reserve fund if –

(A) The agency gives the Secretary prior notice setting forth a detailed justification for the action;

(B) The Secretary determines that such credits were made erroneously and in good faith; and

(C) The Secretary determines that the action would not unfairly prejudice other parties.

(iii) A guaranty agency shall correct any other errors in its accounting or reporting as soon as practicable after the errors become known to the agency.

(iv) If a general reconstruction of a guaranty agency's historical accounting records is necessary to make a change under paragraphs (a)(4)(ii) and (a)(4)(iii) of this section or any other retroactive change to its accounting records, the agency may make this reconstruction only upon prior approval by the Secretary and without any deduction from its reserve fund for the cost of the reconstruction.

(5) *Investments.* The guaranty agency shall exercise the level of care required of a fiduciary charged with the duty of investing the money of others when it invests the assets of the reserve fund described in paragraph (a)(i) of this section. It may invest these assets only in low-risk securities, such as obligations issued or guaranteed by the United States or a State.

(6) *Development of assets.* (i) If the guaranty agency uses in a substantial way for purposes other than the agency's guaranty activities any funds required to be credited to the reserve fund under paragraph (a)(1) of this section or any assets derived from the reserve fund to develop an asset of any kind and does not in good faith allocate a portion of the cost of developing and maintaining the developed asset to funds other than the reserve fund, the Secretary may require the agency to –

(A) Correct this allocation under paragraph (a)(4)(iii) of this section; or

(B) Correct the recorded ownership of the asset under paragraph (a)(4)(iii) of this section so that –

(*1*) If, in a transaction with an unrelated third party, the agency sells or otherwise derives revenue from uses of the asset that are unrelated to the agency's guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a percentage of the sale proceeds or revenue equal to the fair percentage of the total development cost of the asset paid with the reserve fund monies or provided by assets derived from the reserve fund; or

(2) If the agency otherwise converts the assets, in whole or in part, to a use unrelated to its guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a fair percentage of the fair market value or, in the case of a temporary conversion, the rental value of the portion of the asset employed for the unrelated use.

(ii) If the agency uses funds or assets described in paragraph (a)(6)(i) of this section in the manner described in that paragraph and makes a cost and maintenance allocation erroneously and in good faith, it shall correct the allocation under paragraph (a)(4)(iii) of this section.

(7) *Third-party claims.* If the guaranty agency has any claim against any other party to recover funds or other assets for the reserve fund, the claim is the property of the United States.

(8) *Related-party transactions.* All transactions between a guaranty agency and a related organization or other person that involve funds required to be credited to the agency's reserve fund under paragraph (a)(1) of this section or assets derived from the reserve fund must be on terms that are not less advantageous to the reserve fund than would have been negotiated on an arm's-length basis by unrelated parties.

(9) *Scope of definition.* The provisions of this § 682.410(a) define reserve funds and assets for purposes of section 422 and 428 of the Act. These provisions do now, however, affect the Secretary's authority to use all funds and assets of the agency pursuant to section 428(c)(9)(F)(vi) of the Act.

(10) *Minimum reserve fund level.* The guaranty agency must maintain a current minimum reserve level of not less than –

(i) .5 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1993;

(ii) .7 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1994;

(iii) .9 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1995; and

(iv) 1.1 percent of the amount of loans outstanding, for each fiscal year of the agency that begins on or after January 1, 1996.

(11) *Definitions.* For purposes of this section –

(i) *Reserve fund level* means –

(A) The total of reserve fund assets as defined in paragraph (a)(1) of this section;

(B) Minus the total amount of the reserve fund assets used in accordance with paragraphs (a)(2) and (a)(3) of this section; and

(ii) *Amount of loans outstanding* means –

(A) The sum of –

(*1*) The original principal amount of all loans guaranteed by the agency; and

(2) The original principal amount of any loans on which the guarantee was transferred to the agency from another guarantor, excluding loan guarantees transferred to another agency pursuant to a plan of the Secretary in response to the insolvency of the agency;

(B) Minus the original principal amount of all loans on which –

(1) The loan guarantee was cancelled;

(2) The loan guarantee was transferred to another agency;

(3) Payment in full has been made by the borrower;

(4) Reinsurance coverage has been lost and cannot be regained; and

(5) The agency paid claims.

(b) *Administrative requirements* – (1) *Independent audits.* The guaranty agency shall arrange for an independent financial and compliance audit of the agency's FFEL program as follows:

(i) With regard to a guaranty agency that is an agency of a State government, an audit must be conducted in accordance with 31 U.S.C. 7502 and 34 CFR part 80, appendix G.

(ii) With regard to a guaranty agency that is a nonprofit organization, an audit must be conducted in accordance with OMB Circular A-133, Audits of Institutions of Higher Education and Other Nonprofit Organizations and 34 CFR 74.61(h)(3). If a nonprofit guaranty agency meets the criteria in Circular A-133 to have a program specific audit, and chooses that option, the program specific audit must meet the following requirements:

(A) The audit must examine the agency's compliance with the Act, applicable regulations, and agreements entered into under this part.

(B) The audit must examine the agency's financial management of its FFEL program activities.

(C) The audit must be conducted in accordance with the standards for audits issued by the United States General Accounting Office's (GAO) Government Auditing Standards. Procedures for audits are contained in an audit guide developed by, and available from, the Office of the Inspector General of the Department.

(D) The audit must be conducted annually and must be submitted to the Secretary within six months of the end of the audit period. The first audit must cover the agency's activities for a period that includes July 23, 1992, unless the agency is currently submitting audits on a biennial basis, and the second year of its biennial cycle starts on or before July 23, 1992. Under these circumstances, the agency shall submit a biennial audit that includes July 23, 1992 and submit its next audit as an annual audit.

(2) *Collection charges.* Whether or not provided for in the borrower's promissory note, the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim. These costs may include, but are not limited to, all attorney's fees, collection agency charges, and court costs. The amount charged a borrower shall equal the lesser of –

(i) The amount that would be charged for the costs of collection under the formula in 34 CFR 30.60; or

(ii) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

(3) *Interest charged by guaranty agencies.* The guaranty agency shall charge the borrower interest on the amount owed by the borrower after the capitalization required under paragraph (b)(4) of this section has occurred at a rate that is the greater of –

(i) The rate established by the terms of the borrower's original promissory note;

(ii) In the case of a loan for which a judgment has been obtained, the rate provided for by State law.

(4) *Capitalization of unpaid interest.* The guaranty agency shall capitalize any unpaid interest due the lender from the borrower at the time the agency pays a default claim to the lender.

(5) *Credit bureau reports.* (i) After the completion of the procedures in paragraph (b)(5)(ii) of this section, the guaranty agency shall, after it has paid a default claim, report promptly, but not less than sixty days after completion of the procedures in paragraph (b)(6)(iii) of this section, and on a regular basis, to all national credit bureaus –

(A) The total amount of loans made to the borrower and the remaining balance of those loans;

(B) The date of default;

(C) Information concerning collection of the loan, including the repayment status of the loan;

(D) Any changes or corrections in the information reported by the agency that result from information received after the initial report; and

(E) The date the loan is fully repaid by or on behalf of the borrower or discharged by reason of the borrower's death, bankruptcy, or total and permanent disability.

(ii) The guaranty agency, promptly after it pays a default claim on a loan but before it reports the default to a credit bureau or assesses collection costs against a borrower, shall provide the borrower with –

(A) Written notice that meets the requirements of paragraph (b)(5)(vi) of this section regarding the proposed actions;

(B) An opportunity to inspect and copy agency records pertaining to the loan obligation;

(C) An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and

(D) An opportunity to enter into a repayment agreement on terms satisfactory to the agency.

(iii) The procedures set forth in 34 CFR 30.20-30.33 (administrative offset) satisfy the requirements of paragraph (b)(5)(ii) of this section.

(iv)(A) In response to a request submitted by a borrower, after the deadlines established under agency rules, for access for records, an administrative review, or for an opportunity to enter into a repayment agreement, the agency shall provide the requested relief but may continue reporting the debt to credit bureaus until it determines that the borrower has demonstrated that the loan obligation is not legally enforceable or that alternative

repayment arrangements satisfactory to the agency have been made with the borrower.

(B) The deadline established by the agency for requesting administrative review under paragraph (b)(5)(ii)(C) of this section must allow the borrower at least 60 days from the date the notice described in paragraph (b)(5)(ii)(A) of this section is sent to request that review.

(v) An agency may not permit an employee, official, or agent to conduct the administrative review required under this paragraph if that individual is –

(A) Employed in an organizational component of the agency or its agent that is charged with collection of loan obligations; or

(B) Compensated on the basis of collections on loan obligations.

(vi) The notice sent by the agency under paragraph (b)(5)(ii)(A) of this section must –

(A) Advise the borrower that the agency has paid a default claim filed by the lender and has taken assignment of the loan;

(B) Identify the lender that made the loan and the school for attendance at which the loan was made;

(C) State the outstanding principal, accrued interest, and any other charges then owing on the loan;

(D) Demand that the borrower immediately begin repayment of the loan;

(E) Explain the rate of interest that will accrue on the loan, that all costs incurred to collect the loan will be charged to the borrower, the authority for assessing these costs, and the manner in which the agency will calculate the amount of these costs;

(F) Notify the borrower that the agency will report the default to all national credit bureaus to the detriment of the borrower's credit rating;

(G) Explain the opportunities available to the borrower under agency rules to request access to the agency's records on the loan, to request an administrative review of the legal enforceability or past-due status of the loan, and to reach an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted to credit bureaus and provide deadlines and method for requesting this relief;

(H) Unless the agency uses a separate notice to advise the borrower regarding other proposed enforcement actions, describe specifically any other enforcement action, such as offset against federal or state income tax refunds or wage garnishment that the agency intends to use to collect the debt, and explain the procedures available to the borrower prior to those other enforcement actions for access to records, for an administrative review, or for agreement to alternative repayment terms;

(I) Describe the grounds on which the borrower may object that the loan obligation as stated in the notice is not a legally enforceable debt owed by the borrower;

(J) Describe any appeal rights available to the borrower from an adverse decision on administrative review of the loan obligation;

(K) Describe any right to judicial review of an adverse decision by the agency regarding the legal enforceability or past-due status of the loan obligation; and

(L) Describe the collection actions that the agency may take in the future if those presently proposed do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and assignment of the loan to the Secretary for the filing of a lawsuit against the borrower by the Federal Government.

(6) *Collection efforts on defaulted loans.* (i) A guaranty agency shall engage in at least the collection activities described in paragraphs (b)(6)(iii) through (xii) of this section on a loan on which it pays a default claim filed by a lender, and shall attempt an annual IRS offset on each eligible loan, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6)(iii) through (vi) of this section.

If, after initiating wage garnishment procedures, the agency terminates those procedures for a particular borrower, the agency shall, within 30 days, commence collection efforts at least as forceful as those described in paragraphs (b)(6)(iii) through (xii) of this section. The agency's collection efforts shall begin with the same collection activities as those that immediately preceded the initiation of garnishment procedures, or, if no collection activities had been performed, the agency shall begin

with the activities described in paragraph (b)(6)(iii) of this section, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6)(iii) through (vi) of this section.

(ii)(A) The periods of time set forth in paragraphs (b)(6)(iii)-(xii) and (b)(7) of this section refer to the number of days that elapse from the date the agency pays a default claim on a loan or on multiple loans for a borrower. These periods of time do not include any periods during which the agency is engaged in activities related to administrative wage garnishment, or is receiving a payment through garnishment at least once every 60 days during the period specified in paragraph (5)(iv)(B) of this section, or during which the agency is engaged in an administrative review of the borrower's indebtedness on the loan pursuant to a request by the borrower under paragraph (b)(5)(iv) of this section. References to the "borrower" in this paragraph and paragraph (b)(7) of this section include all endorsers on a loan.

(B) The agency may institute a civil suit against the borrower earlier than the first day of the period described in paragraph (b)(6)(vii) of this section. Upon instituting suit, the agency is not required thereafter to follow the procedures in paragraphs (b)(6)(iii) or (b)(7) of this section.

(C) Upon receipt of a payment from a borrower during a period described in paragraphs (b)(6)(iii) or (iv) of this section, or, in the case of a borrower whom the agency locates through the use of skip-tracing under

paragraph (b)(6)(xii) of this section, the agency is not required to follow the specific collection efforts described in paragraphs (b)(6)(iii)-(vii) of this section if the written notice described in paragraph (b)(5)(ii) of this section has been sent but shall diligently attempt to collect the loan for 60-days following receipt of the payment or receipt of confirmation of the borrower's address as applicable. If the agency receives no payments during the 60-day period, the agency shall resume its use of the collection efforts described in paragraphs (b)(6)(iv)-(ix) of this section, treating the first day after the end of the 60-day period as the first day of the period described in paragraphs (b)(6)(iv) of this section.

(iii) One – 45 days: During this period, the agency shall –

(A) Send to the borrower the written notice described in paragraph (b)(5)(ii) of this section, and a written notice stating that the agency either will initiate procedures to garnish the borrower's wages, or institute a civil suit to compel repayment of the amount that the borrower owes plus related collection costs; and

(B) Diligently attempt to contact the borrower by telephone, as defined in § 682.411(l) (with references to "the lender" understood to mean "the agency"), to demand payment of the loan.

(iv) 46-180 days: During this period the agency shall –

(A) Engage in at least two diligent attempts to contact the borrower by telephone, as defined in § 682.411(1)

(with references to "the lender" understood to mean "the agency") to demand repayment of the loan; and

(B) Send at least three written notices to the borrower forcefully demanding that the borrower immediately commence repayment of the loan, and informing the borrower that the default has been reported to all national credit bureaus (if that is the case) and that the borrower's credit rating may thereby have been damaged. The final notice also must indicate that it is the final notice the borrower will receive before the agency will take more forceful action, including the initiation of procedures to garnish the borrower's wages, or to offset the borrower's state and federal income tax refunds, or instituting a civil suit to compel repayment of the amount that the borrower owes plus related collection costs.

(v) At no point during the periods described in paragraphs (b)(6)(iii) and (iv) of this section may the agency permit the occurrence of a gap in collection activity of more than 60 days.

(vi) For purposes of paragraph (b)(6)(v) of this section, the term *gap in collection activity* means, with respect to a loan, any period –

(A) Beginning on the date that is the day after –

(*1*) The date the agency paid a default claim to the lender thereon;

(2) The day on which the agency receives the correct address for a borrower who has made no payment in the preceding 60 days; or

(3) The day on which the agency completes a collection activity as defined in § 682.411(k)(1) through (3)

(with references to "the lender" therein understood to mean "the agency"); and

(B) Ending on the date of the earliest of –

(*1*) The day on which the agency receives the first subsequent payment;

(2) The day on which the agency begins the first subsequent collection activity as defined in § 682.411(k)(1) through (3) (with references to the "lender" understood to mean "the agency"); or

(*3*) The last day of the period described in paragraph (b)(6)(iv) of this section.

(vii) 181-545 days:

(A) Except as provided in paragraph (b)(6)(vii)(B) of this section, during this period, but not sooner than 30 days after sending the notice described in paragraph (b)(5)(vi) of this section, the agency shall initiate proceedings to offset the borrower's state and federal income tax refunds, and shall either initiate wage garnishment proceedings against the borrower by the 225th day, or, by the 545th day, institute a civil suit against the borrower for repayment of the loan.

(B) The agency need not file suit if the agency determines and documents in the borrower's file that –

(*1*) The cost of litigation would exceed the likely recovery if litigation was begun; or

(2) The borrower does not have the means to satisfy a judgment on the debt or a substantial portion thereof.

(viii)(A) If as a result of a determination made pursuant to paragraph (B)(6)(vii)(D)(2) of this section the agency does not institute a civil suit against the borrower for repayment of the loan, the agency shall conduct diligent semi-annual inquiries to determine if the borrower has since acquired the means to satisfy a judgment on the debt or a substantial portion thereof.

(B) If the agency determines that the borrower has acquired the means to satisfy at least a substantial portion of the debt and that the cost of litigation would not exceed the amount likely to be obtained if litigation were begun, then, if subsequent collection efforts are not successful, the agency, no later than 60 days after the determination, shall institute a civil suit against the borrower for repayment of the loan.

(C) The guaranty agency shall document in the borrower's file determinations made pursuant to this paragraph.

(ix)(A) The agency shall attempt diligently to enforce a judgment obtained against a borrower on a loan and shall ensure that the judgment is renewed as permitted by applicable law. If, despite diligent attempts, the agency cannot recover the full amount of the judgment because the borrower lacks sufficient assets or income attachable under applicable law to fully satisfy the judgment, the agency shall conduct diligent semi-annual inquiries to determine if the borrower has since acquired sufficient attachable assets or income to satisfy the remainder of the judgment.

(B) If the agency determines that the borrower has acquired sufficient attachable assets or income to satisfy

the remainder of the judgment and that the cost of enforcing the judgment would not exceed the likely recovery, the agency, not later than 60 days thereafter, shall notify the borrower in writing of its intention to resume enforcement efforts on the judgment unless the borrower makes payment in full of all outstanding amounts.

(C) If the borrower does not make payment in full within 30 days of the date the agency sends the notice described in paragraph (b)(6)(ix)(B) of this section, the agency, within 30 days thereafter, shall proceed to enforce the remainder of the judgment.

(x) The agency may discontinue conducting the semi-annual inquiries concerning a borrower's means required by paragraphs (b)(6)(viii) and (ix) of this section only in accordance with criteria and procedures approved by the Secretary.

(xi) Notwithstanding paragraphs (b)(6)(vii)-(x) of this section, the agency shall file a civil suit against the borrower for repayment of the loan, and shall enforce a judgment obtained thereon unless the agency –

(A) Determines and documents in the borrower's file that the cost of litigation would exceed the judgment amount likely to be obtained if litigation were begun, or, in the case of a proceeding to enforce a judgment, that the cost of such a proceeding would exceed the likely recovery from the debtor; or

(B) Previously has discontinued semi-annual inquiries on the debt in accordance with paragraph (b)(6)(x) of this section.

(xii) Not later than 10 days after its receipt of information indicating that it does not know the current address of a borrower on a loan on which the agency has neither declined to sue under paragraph (b)(6)(vii)(B) of this section nor discontinued semi-annual inquiries under paragraph (b)(6)(x) of this section, or the 60th day after its payment of a default claim on the loan, whichever is later, the agency shall attempt diligently to locate the borrower through the use of all available skip-tracing techniques, including, but not limited to, any skip-tracing assistance available from the IRS, credit bureaus, and state motor vehicle departments. A guaranty agency shall use any information provided by a school about a borrower's location in conducting skip-tracing activities.

(7) *Alternative collection procedures for defaulted loans.* (i) A guaranty agency may engage in the following collection activities in lieu of the activities described in paragraphs (b)(6)(iii)-(iv) of this section. The regulations in paragraphs (b)(6)(ii)(A) and (B) of this section apply to the periods of time set forth in paragraphs (b)(7)(iii)-(v) of this section.

(ii) Upon receipt of a payment from a borrower, the agency is not required to follow the specific collection efforts described in paragraphs (b)(7)(iii)-(vi) of this section but shall diligently attempt to collect the loan for 60 days following receipt of the payment. If the agency receives no payments during the 60-day period, the agency shall resume its use of the collection efforts described in paragraphs (b)(7)(iii)-(vi) of this section, treating the first day after the end of the 60-day period as the first day of the period described in paragraph (b)(7)(iv) of this section.

(iii) 1-30 days: During this period the agency shall send to the borrower the written notice described in paragraph (b)(5)(ii) of this section.

(iv)(A) 31-180 days: During this period the guaranty agency shall attempt diligently to collect the loan using such collection tools and activities as it deems appropriate, provided, however, that the agency must make at least one diligent effort to contact the borrower by telephone, as defined in § 682.411(l) (with references to "the lender" understood to mean "the agency"), and send at least two forceful collection letters to the borrower.

(B) By the end of this period, the agency shall refer the loan to a collection contractor in accordance with paragraph (b)(7)(iv)(C) of this section.

(C) The collection contractor to whom the agency refers a loan under paragraph (b)(7)(iv)(B) of this section must –

(*1*) Be compensated for its services on all FFEL loans referred by the agency solely on a contingency fee basis;

(2) Be one of at least two collection contractors simultaneously providing collection services to the agency on FFEL loans under a competitive system that the agency has established and that includes the periodic assessment by the agency of the performance of the competing contractors and periodic adjustments in the volume of loans referred by the agency to each competing contractor based on those assessments; and

(3) Not receive referral of more than 70 percent of the agency's referred loans in any calendar year.

(v) Notwithstanding the deadline for instituting a civil suit set forth in paragraph (b)(6)(vii) of this section, an agency that uses the procedures in paragraphs (b)(7)(i)-(iv) of this section shall institute a civil suit required by that paragraph prior to the earliest of –

(A) The 90th day following the collection contractor's return of the loan to the agency; or

(B) The 365th day following the later of the agency's referral of the loan to the collection contractor, or the contractor's receipt of a payment on the loan.

(8) *Special conditions for agency payment of a claim.* (i) A guaranty agency may adopt a policy under which it pays a claim to a lender on a loan under the conditions described in § 682.509(a)(1).

(ii) Upon the payment of a claim under a policy described in paragraph (b)(8)(i) of this section, the guaranty agency shall –

(A) Perform the loan servicing functions required of a lender under § 682.208, except that the agency is not required to follow the credit bureau reporting requirements of that section;

(B) Perform the functions of the lender during the repayment period of the loan, as required under § 682.209;

(C) If the borrower is delinquent in repaying the loan at the time the agency pays a claim thereon to the lender or becomes delinquent while the agency holds the loan, exercise due diligence in accordance with § 682.411 in attempting to collect the loan from the borrower and any endorser or comaker; and

(D) After the date of default on the loan, if any, comply with paragraph (b)(6)(i) of this section with respect to collection activities on the loan, with the date of default treated as the claim payment date for purposes of those paragraphs.

(9) *Preemption of State law.* The provisions of paragraphs (b)(2), (5), (6), and (7) of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions.

(10) *Administrative Garnishment.* (i) If a guaranty agency decides to garnish the disposable pay of a borrower who is not making payments on a loan held by the agency, on which the Secretary has paid a reinsurance claim, it shall do so in accordance with the following procedures:

(A) The employer shall deduct and pay to the agency from a borrower's wages an amount that does not exceed the lesser of 10 percent of the borrower's disposable pay for each pay period or the amount permitted by 15 U.S.C. 1673, unless the borrower provides the agency with written consent to deduct a greater amount. For this purpose, the term "disposable pay" means that part of the borrower's compensation from an employer remaining after the deduction of any amounts required by law to be withheld.

(B) At least 30 days before the initiation of garnishment proceedings, the guaranty agency shall mail to the borrower's last known address, a written notice of the nature and amount of the debt, the intention of the agency to initiate proceedings to collect the debt through

deductions from pay, and an explanation of the borrower's rights.

(C) The guaranty agency shall offer the borrower an opportunity to inspect and copy agency records related to the debt.

(D) The guaranty agency shall offer the borrower an opportunity to enter into a written repayment agreement with the agency under terms agreeable to the agency.

(E) The guaranty agency shall offer the borrower an opportunity for a hearing in accordance with paragraph (b)(10)(i)(J) of this section concerning the existence or the amount of the debt and, in the case of a borrower whose proposed repayment schedule under the garnishment order is established other than by a written agreement under paragraph (b)(10)(i)(D) of this section, the terms of the repayment schedule.

(F) The guaranty agency shall sue any employer for any amount that the employer, after receipt of the garnishment notice provided by the agency under paragraph (b)(10)(i)(H) of this section, fails to withhold from wages, owed and payable to an employee under the employer's normal pay and disbursement cycle.

(G) The guaranty agency may not garnish the wages of a borrower whom it knows has been involuntarily separated from employment until the borrower has been reemployed continuously for at least 12 months.

(H) Unless the guaranty agency receives information that the agency believes justifies a delay or cancellation of the withholding order, it shall send a withholding order to the employer within 20 days after the borrower

fails to make a timely request for a hearing, or, if a timely request for a hearing is made by the borrower, within 20 days after a final decision is made by the agency to proceed with garnishment.

(I) The notice given to the employer under paragraph (b)(10)(i)(H) of this section must contain only the information as may be necessary for the employer to comply with the withholding order.

(J) The guaranty agency shall provide a hearing, which, at the borrower's option, may be oral or written, if the borrower submits a written request for a hearing on the existence or amount of the debt or the terms of the repayment schedule. The time and location of the hearing shall be established by the agency. An oral hearing may, at the borrower's option, be conducted either in-person or by telephone conference. All telephonic charges must be the responsibility of the guaranty agency.

(K) If the borrower's written request is received by the guaranty agency on or before the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency may not issue a withholding order until the borrower has been provided the requested hearing. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency. The guaranty agency shall provide a hearing to the borrower in sufficient time to permit a decision, in accordance with the procedures that the agency may prescribe, to be rendered within 60 days.

(L) If the borrower's written request is received by the guaranty agency after the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency shall provide a hearing to the borrower in sufficient time that a decision, in accordance with the procedures that the agency may prescribe, may be rendered within 60 days, but may not delay issuance of a withholding order unless the agency determines that the delay in filing the request was caused by factors over which the borrower had no control, or the agency receives information that the agency believes justifies a delay or cancellation of the withholding order. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency.

(M) The hearing official appointed by the agency to conduct the hearing may be any qualified individual, including any administrative law judge, not under the supervision or control of the head of the guaranty agency.

(N) The hearing official shall issue a final written decision at the earliest practicable date, but not later than 60 days after the guaranty agency's receipt of the borrower's hearing request.

(O) As specified in section 488A(a)(8) of the HEA, the borrower may seek judicial relief, including punitive damages, if the employer discharges, refuses to employ, or takes disciplinary action against the borrower due to the issuance of a withholding order.

(ii) References to "the borrower" in this paragraph include all endorsers on a loan.

(c) *Enforcement requirements.* A guaranty agency shall take such measures and establish such controls as are necessary to ensure its vigorous enforcement of all Federal, State, and guaranty agency requirements, including agreements, applicable to its loan guarantee program, including, at a minimum, the following:

(1) Conducting comprehensive biennial on-site program reviews, using statistically valid techniques to calculate liabilities to the Secretary that each review indicates may exist, of at least –

(i)(A) Each participating lender whose dollar volume of FFEL loans made or held by the lender and guaranteed by the agency in the preceding year –

(*1*) Equaled or exceeded two percent of the total of all loans guaranteed in that year by the agency;

(2) Was one of the ten largest lenders whose loans were guaranteed in that year by the agency; or

(3) Equaled or exceeded $10 million in the most recent fiscal year;

(B) Each lender described in section 435(d)(1)(D) or (J) of the Act that is located in any State in which the agency is the principal guarantor as defined in § 682.800(d), and, at the option of each guaranty agency, the Student Loan Marketing Association; and

(C) Each participating school, located in a State for which the guaranty agency is the principal guaranty agency, that has a cohort default rate, as defined in 34

CFR 668.15, for either of the two immediately preceding fiscal years, as defined in § 668.15, that exceeds 20 percent, unless the school is under a mandate from the Secretary under § 668.15 to take specific default reduction measures or if the total dollar amount of loans entering repayment in each fiscal year on which the default rate over 20 percent is based does not exceed $100,000; or

(ii) The schools and lenders selected by the agency as an alternative to the reviews required by paragraphs (c)(1)(A)-(C) of this section if the Secretary approves the agency's proposed alternative selection methodology.

(2) Demanding prompt repayment by the responsible parties to lenders, borrowers, the agency, or the Secretary, as appropriate, of all funds found in those reviews to be owed by the participants with regard to loans guaranteed by the agency, whether or not the agency holds the loans, and monitoring the implementation by participants of corrective actions, including these repayments, required by the agency as a result of those reviews.

(3) Referring to the Secretary for further enforcement action any case in which repayment of funds to the Secretary is not made in full within 60 days of the date of the agency's written demand to the school, lender, or other party for payment, together with all supporting documentation, any correspondence, and any other documentation submitted by that party regarding the repayment.

(4) Adopting procedures for identifying fraudulent loan applications.

(5) Undertaking or arranging with State or local law enforcement agencies for the prompt and thorough investigation of all allegations and indications of criminal or other programmatic misconduct by its program participants, including violations of Federal law or regulations.

(6) Promptly referring to appropriate State and local regulatory agencies and to nationally recognized accrediting agencies and associations for investigation information received by the guaranty agency that may affect the retention or renewal of the license or accreditation of a program participant.

(7) Promptly reporting all of the allegations and indications of misconduct having a substantial basis in fact, and the scope, progress, and results of the agency's investigations thereof to the Secretary.

(8) Referring appropriate cases to State or local authorities for criminal prosecution or civil litigation.

(9) Promptly notify the Secretary of –

(i) Any action it takes affecting the FFEL program eligibility of a participating lender or school;

(ii) Information it receives regarding an action affecting the FFEL program eligibility of a participating lender or school taken by a nationally recognized accrediting agency, association, or a State licensing agency;

(iii) Any judicial or administrative proceeding relating to the enforceability of FFEL loans guaranteed by the agency or in which tuition obligations of a school's students are directly at issue, other than a proceeding relating to a single borrower or student; and

(iv) Any petition for relief in bankruptcy, application for receivership, or corporate dissolution proceeding brought by or against a school or lender participating in its loan guarantee program.

(10) Cooperating with all program reviews, investigations, and audits conducted by the Secretary relating to the agency's loan guarantee program.

(11) Taking prompt action to protect the rights of borrowers and the Federal fiscal interest respecting loans that the agency has guaranteed when the agency learns that a participating school or holder of loans is experiencing problems that threaten the solvency of the school or holder, including –

(i) Conducting on-site program reviews;

(ii) Providing training and technical assistance, if appropriate;

(iii) Filing a proof of claim with a bankruptcy court for recovery of any funds due the agency and any refunds due to borrowers on FFEL loans that it has guaranteed when the agency learns that a school has filed a bankruptcy petition;

(iv) Promptly notifying the Secretary that the agency has determined that a school or holder of loans is experiencing potential solvency problems; and

(v) Promptly notifying the Secretary of the results of any actions taken by the agency to protect Federal funds involving such a school or holder.

(Approved by the Office of Management and Budget under control number 1840-0538)

(Authority: 20 U.S.C. 1078, 1078-1, 1078-2, 1078-3, 1080a, 1082, 1087, 1091a, and 1099)

[57 FR 60323, Dec. 18, 1992, as amended at 58 FR 9119, Feb. 19, 1993; 59 FR 22487, Apr. 29, 1994; 59 FR 25747, May 17, 1994; 59 FR 35625, July 13, 1994; 59 FR 60691, Nov. 25, 1994]

Section 682.413 of 34 C.F.R. provides in pertinent part:

§ 682.413. Remedial actions.

* * *

(b) The Secretary requires a guaranty agency to repay reinsurance payments received on a loan if the lender, third-party servicer, if applicable, or the agency failed to meet the requirements of § 682.406(a).

(c)(1) In addition to requiring repayment of reinsurance payments pursuant to paragraph (b) of this section, the Secretary may take one or more of the following remedial actions against a guaranty agency or third-party servicer administering any aspect of the FFEL programs under a contract with the guaranty agency, that makes an incomplete or incorrect statement in connection with any agreement entered into under this part or violates any applicable Federal requirement:

(i) Require the agency to return payments made by the Secretary to the agency.

(ii) Withhold payments to the agency.

(iii) Limit the terms and conditions of the agency's continued participation in the FFEL programs.

(iv) Suspend or terminate agreements with the agency.

(v) Impose a fine on the agency or servicer. For purposes of assessing a fine on a third-party servicer, a repeated mechanical systemic unintentional error shall be counted as one violation, unless the servicer has been cited for a similar violation previously and had failed to make the appropriate corrections to the system.

(vi) Require repayment from the agency and servicer pursuant to paragraph (c)(2) of this section, of interest, special allowance, and reinsurance paid on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1).

(vii) Require repayment from the agency or servicer, pursuant to paragraph (c)(2) of this section, of any related payments that the Secretary became obligated to make to others as a result of an incomplete or incorrect statement or a violation of an applicable Federal requirement.

(2) For purposes of this section, a guaranty agency and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits, special allowance, reinsurance paid, or other compensation on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1) as a result of a violation by the servicer administering any aspect of the FFEL programs under a contract with that guaranty agency.

(3) For purposes of paragraph (c)(2) of this section, the relevant third-party servicer shall repay any outstanding liabilities under paragraph (c)(2) of this section only if –

(i) The Secretary has determined that the servicer is jointly and severally liable for the liabilities; and

(ii)(A) The guaranty agency has not repaid in full the amount of the liability within 30 days from the date the guaranty agency receives notice from the Secretary of the liability;

(B) The guaranty agency has not made other satisfactory arrangements to pay the amount of the liability within 30 days from the date the guaranty agency receives notice from the Secretary of the liability; or

(C) The Secretary is unable to collect the liability from the guaranty agency by offsetting the guaranty agency's first reinsurance claim to the Secretary, if –

(*1*) The claim is submitted after the 30-day period specified in paragraph (c)(3)(ii)(A) of this section has passed; and

(2) The guaranty agency has not paid, or made satisfactory arrangements to pay, the liability.

* * *

(e)(2)(i) The Secretary may withhold payments from an agency or suspend an agreement with an agency prior to giving notice and an opportunity to be heard if the Secretary finds that emergency action is necessary to prevent substantial harm to Federal interests.

EXHIBIT F

APPENDIX F

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

September 12, 1996

Samuel D. Walker
Wiley, Rein and Fielding
1776 K Street, N.W.
Washington, DC 20006

Re: *April Brannan v. United Student Aid Funds, Inc.* No. 93-35555 (9th Cir. August 30, 1996)

Dear Mr. Walker:

We write to express the Department's concern about the ruling of the Ninth Circuit Court of Appeals in this case that United Student Aid Funds (USA Funds) is subject to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA). For the reasons explained here, the Department believes this ruling to be incorrect, and to undermine the Federal objective so articulately appreciated in the companion ruling that Department regulations mandating specific collection actions on defaulted Guaranteed Student Loans (GSLs) preempt State laws such as the Oregon Unfair Debt Collection Practices Act. The ruling that USA Funds is subject to the FDCPA appears to rest on a misreading of a Departmental statement but more importantly directly conflicts with the longstanding views of the Federal Trade Commission and the Department that, for reasons not addressed in the decision, the FDCPA does not apply to guarantors. It does not appear that either Federal agency's views on this issue were presented to the court. Because we believe these views are valuable for the court's consideration, and because

the Department is concerned that this ruling would undermine the Federal objective, recognized by the court, that a uniform minimum national collection process be followed to collect defaulted student loans, we offer the following comments to support a request for rehearing on this issue.

In this decision, the court considered at length a 1990 interpretation by the Department of the preemptive effect of its regulations on State laws regulating debt collection activities. Notice of Interpretation ("Interpretation"), 55 Fed. Reg. 40120, October 10, 1990. Department regulations required guaranty agencies participating in the Federal Family Education Loan Programs (then called the Guaranteed Student Loan Programs) to perform a series of actions to collect defaulted GSLs on which the Department had paid reinsurance claims.[1] Claims by borrowers that State debt collection laws prevented lenders, guarantors, and their "third party collection contractors" from performing some of these collection actions prompted the Department to issue this interpretation of its regulations. 55 Fed. Reg. 40121. The Department's regulations at that time did not expressly preempt such State laws, but the Interpretation articulated the Department's understanding that the regulations nevertheless preempted State

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[1] The Interpretation also addressed the effect of State laws on collection duties imposed by regulations on lenders, but the applicability of the FDCPA to those activities turns on different considerations than its application to guaranty agency collection actions.

law.[2] The Interpretation, as pertinent to the FDCPA coverage issue, stated that

> A great deal of the collection action on GSL Program loans is performed *for guaranty agencies by third party collection contractors* . . . the Secretary took particular note of the existence of Federal law that regulated the conduct *of these third party collectors of defaulted student loans. These debt collectors were subject to the Fair Debt Collection Practices Act,* . . . and even under these preempting regulations *they* remain subject to the FDCPA. . . .

(emphasis added) 55 Fed. Reg. 40121. The words "they" and "these debt collectors" here refer to contractors described in the preceding sentences that are retained by the guarantors to collect on their behalf, and not to the guaranty agencies themselves. The Department neither stated nor implied that the guaranty agencies themselves were subject to the FDCPA when acting directly to collect defaulted student loans.[3] To the contrary, the Department used the term "third party debt collectors" in this paragraph of the Interpretation to refer to these "collection contractors" acting *for* the guaranty agencies, because the term "third party debt collector" has long been used in discussions of the FDCPA to describe those entities that

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[2] The Department amended these regulations on December 18, 1992 to expressly preempt these State laws. 34 C.F.R. § 682.410(b)(9), 57 Fed. Reg. 60358, Dec. 18, 1992.

[3] Guaranty agencies may also perform billing services on student loans they do not hold, and issue repayment demands on behalf of lenders for delinquent loans guaranteed by the agency but still held by the lenders. Those activities are not at issue here.

collected debts owed to others and that were subject to the FDCPA, in contrast to creditors themselves, parties to whom the debt was actually owed, which were specifically excluded from coverage under the FDCPA. *See, e.g.*, S. Rep. No. 382, 95th Cong. 2d Sess. 2 (1977). Because the guaranty agencies took assignment of defaulted loans on which they had paid guarantee claims and thereafter collected these loans in their own name and to protect the financial interests of their own guarantee programs, they were properly considered to be the actual creditors to whom the defaulted loans were owned. As creditors collecting in their own name, therefore, guaranty agencies were not subject to the FDCPA. 15 U.S.C. § 1692a(4).[4]

The Federal Trade Commission, the agency charged with administrative enforcement authority under the FDCPA, has for years agreed that guaranty agencies are not subject to the FDCPA when collecting defaulted loans on

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[4] The Department is owed a share of any recovery by the guarantor on a defaulted loan on which the Department has paid reinsurance, 20 U.S.C. § 1078(c)(2)(D), (6), and the guaranty agency in collecting the loan promotes the Department's interests. However, the guarantor bears part of the loss in payment of a default claim, and that portion increases as the default rate on its loans increases and Federal reinsurance coverage decreases. 20 U.S.C. § 1078(c)(1)(B), *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996). Regardless of how one characterizes the guarantor's role *vis a vis* the Department in collecting the loan, the guarantor collects to enforce its own distinct financial interest as well as those of the Department. Thus, although the guarantor does take assignment of debts in default, it does not do so "solely for the purpose of facilitating collection for" the Department, 15 U.S.C. § 1692a(4), and therefore falls within the FDCPA definition of creditor as opposed to debt collector.

which they had paid guarantee claims. The FTC's Division of Credit Practices directly addressed this issue in a September 12, 1988 response to complaints about the activity of the Great Lakes Higher Education Corporation (GLHEC), another guaranty agency which, like USA Funds, is a non-profit organization:

> In purchasing these defaulted obligations, GLHEC legally becomes the owner of the debts. When GLHEC tries to collect these obligations, GLHEC acts as a creditor collecting its own debt in its own name and is therefore exempt from the definition of debt collector under Section 803(6)(A) of the Act.

September 12, 1988 letter from Cynthia Lamb, FTC Division of Credit Practices to Louise G. Trubek, Center for Public Representation (Enclosure 1). A year later, the Department confirmed that this FTC position remained "authoritative guidance" on this issue. *See*: September 8, 1989 letter from Saul Moskowitz, Chief, Guaranteed Student Loan Branch, to Cynthia S. Lamb, Division of Credit Practices (Enclosure 2). We know of no change since that time in the FTC's views; the Department relied on this understanding both in numerous informal responses to inquiries on this issue, and in framing the statements in the Interpretation at issue here.

The practical effect of the ruling may be very detrimental to the "minimum standard of collection action" prescribed by the Department. If guarantors are subject to the FDCPA, they would not pursue those prescribed collection actions where to do so would be prohibited or penalized by that Act. The FDCPA for example, would

bar guarantors from direct contact with debtors represented by counsel, and would prohibit continued attempts to persuade borrowers to resume repayment after demands that contact cease. The FDCPA would further require guarantors to include technical "warning" language and debt validation notices in written communications with the debtor, provisions that would be confusing, superfluous and even contradict the highly developed disclosure and notice requirements in the Higher Education Act and Department regulations. These restrictions, accompanied by the risk of substantial penalties for even technical violations, could only tend to deter guarantor compliance with the collection process already established by the Department. Moreover, guarantors, which are either State agencies or non-profits whose recoveries are dedicated to loan program purposes, lack the kind of financial incentives for abusive collection practices that the FDCPA is designed to prevent.

For these reasons, we urge USA Funds to present these positions to the court. Thank you for your consideration.

Sincerely,

/s/ Fred J. Marinucci
FRED J. MARINUCCI
Deputy Asst. General
Counsel for Postsecondary
Education

Enclosures

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

September 12, 1988

Ms. Louise G. Trubek
Executive Director
Center for Public Representation
520 University Avenue
Madison, Wisconsin 53703

Dear Ms. Trubek:

This is in response to your recent letter addressed to Jean Noonan. Ms. Noonan has asked me to respond to your inquiry. I apologize for the delay. The answer to your questions involved a considerable amount of research.

Your letter concerns the collection practices of the Wisconsin Higher Education Association, now known as Great Lakes Higher Education Corporation (GLHEC). You allege that GLHEC has been negligent in informing borrowers of deferments and forbearances to which they are entitled. In addition, you allege that GLHEC's collection practices have violated the Fair Debt Collection Practices Act (FDCPA).

First, I must address the question of whether Great Lakes Higher Education Corporation is covered by the Act (copy enclosed). It is my understanding that GLHEC has two separate operating units. One unit services student loans for commercial lending institutions. The other unit guarantees the loans by taking assignments for value after default. In order to violate the Act GLHEC must be covered by its provisions. Coverage is predicated on the

definition of "debt collector" in Section 803(6). Regarding the servicing of loans, Section 803(6)(F)(iii) excludes from the definition any person collecting a debt owed to another party to the extent that the collection activity concerns a debt which was not in default at the time it was obtained. Additionally, in the legislative history of the FDCPA, Congress specified that the term debt collector is "not intended to include . . . mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing."[1] In its capacity as a servicing organization, GLHEC handles a student loan well in advance of any default on the loan; therefore, in this capacity, as a servicing organization, GLHEC is not covered by the FDCPA.

Next, let me address the question of Great Lakes Higher Education Corporation's activities in collecting debts in its capacity as a guarantor of student loans. In this capacity GLHEC purchases student loans which are in default status from commercial lending institutions. In purchasing these defaulted obligations, GLHEC legally becomes the owner of the debts. When GLHEC tries to collect these obligations, GLHEC acts as a creditor collecting its own debt in its own name and is therefore exempt from the definition of debt collector under Section 803(6)(A) of the Act. Therefore, it appears that GLHEC is not a "debt collector" for purposes of the Act and an investigation for violations of the Act is not warranted.

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[1] S. Rep. No. 95-382, 95th Cong. 1st Sess. 3-4, *reprinted in* 1977 U.S. Code Cong. and Ad News 1698.

Many of the consumer complaints you enclosed involve the question of when deferments and forbearances are available to holders of the guaranteed student loans. This question is answered in the Higher Education Act which is administered by the Department of Education. Therefore, I have taken the liberty of forwarding your letter to that agency for its determination of whether deferments and forbearances are being properly handled by GLHEC.

Thank you for your interest in writing to us.

Yours truly,

/s/ Cynthia S. Lamb
CYNTHIA S. LAMB
Investigator
Division of Credit Practices

Enclosure

[Sep. 8, 1989]

Ms. Cynthia S. Lamb
Investigator
Division of Credit Practices
Bureau of Consumer Protection
Federal Trade Commission (FTC)
Washington, D.C. 20589

Dear Ms. Lamb:

This letter is to confirm the conversation between you and Patsy Beavan of my staff regarding your letter of September 12, 1988 to Louise Trubek, Executive Director, Center for Public Representation, in response to questions involving the collection practices of the Great Lakes Higher Education Corporation.

Ms. Beavan inquired as to whether the Department could use this letter as authoritative guidance from the FTC staff in responding to guarantee agencies' inquiries relative to this issue. It is our understanding that this letter has been reviewed by the appropriate officials within the staff of the Federal Trade Commission and may be used in issuing guidance regarding the applicability of the Fair Debt Collection Practices Act in the circumstances outlined therein. You indicated that inquiries as to other circumstances should be submitted directly to the FTC.

It is also our understanding that the term "default" as used in that letter with regard to Guaranteed Student Loans has the meaning found in the definition of "default" set forth in 34 CFR 682.200.

Please contact me or Ms. Beavan if this letter does not accurately affect the position of the FTC staff on this issue.

Sincerely,

SAUL MOSKOWITZ
Chief
Guaranteed Student Loan Branch
Division of Policy
and Program Development

EXHIBIT G

APPENDIX G

DEPARTMENT OF EDUCATION

34 CFR Part 682

RIN 1840-AC35

Federal Family Education Loan Program; Due Diligence Requirements

AGENCY: Department of Education.

ACTION: Final regulations.

[61 Fed. Reg. 60,478, 60,484-85 (Nov. 27, 1996)]

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Comment: One commenter asked the Secretary to address the issue of whether the Federal Fair Debt Collection Practices Act (FDCPA) applies to guaranty agency collection activities on defaulted loans.

Discussion: It has been the longstanding view of the Secretary and the Federal Trade Commission that the FDCPA does not apply to guaranty agencies collecting defaulted FFEL Program loans in their own names and protecting the financial interests of their guarantee programs. The FDCPA does not apply to an entity collecting a debt it is owed. Moreover, application of the FDCPA to the guaranty agencies would potentially penalize them for compliance with the requirements in 34 CFR 682.410 and, thus, is inconsistent with the Secretary's goal of ensuring a minimum standard of collection action. The Secretary notes, however, that the FDCPA clearly applies to a collection contractor acting for the guaranty agency. Such contractors are collecting a debt owed to another and are clearly subject to the FDCPA.

Change: None.